QORTI CIVILI PRIM`AWLA
(GURISDIZZJONI KOSTITUZZJONALI)

ONOR. IMHALLEF
JOSEPH ZAMMIT MCKEON

Illum il-Hamis 26 ta` April 2018

Kawza Nru. 1
Rik. Nru. 25/17 JZM

Rosette Thake, detentrici tal-karta tal-identita` numru 221668M, bhala Segretarju Generali tal-Partit Nazzjonalista flimkien ma Dr Ann Fenech, detentrici tal-karta tal-identita numru 28763M, it-tnejn ghan-nom u in rapprezentanza tal-Partit Nazzjonalista kif awtorizzati skont l-Istatut tal-istess partit, u t-tnejn ta` Dar Centrali, Partit Nazzjonalista, Triq Herbert Ganado, Pieta`,

u

b`digriet tad-29 ta` Novembru 2017 ir-rikorrenti Rosette Thake u Dr Ann Fenech gew sostitwiti bl-Onor. Clyde Puli (ID 369769M) fil-kariga ta` Segretarju Generali u b`Mark Anthony Sammut (ID 111086M) fil-kariga ta` President tal-Kumitat Ezekuttiv tal-Partit Nazzjonalista,

kontra

Kummissjoni Elettorali, ta` Evans Building, Valletta,

u

l-Avukat Generali ta` l-Ufficcju tal-Avukat Generali, Pjazza San Gorg, Belt Valletta

Il-Qorti :

I. <u>Preliminari</u>

Rat ir-rikors prezentat fid-19 ta` April 2017 li jaqra hekk :–

<u>Fatti kif jafuhom ir-rikorrenti</u>

1. Illi matul ix-xhur ta` Marzu u April 2017 ir-rikorrenti saru jafu mill-mezzi tax-xandir li l-Kummissjoni Elettorali kienet se tinvestiga inter alia jekk il-Partit rikorrent kienx segwa l-Att dwar il-Finanzjamenti tal-Partiti, Kapitolu 544 tal-Ligijiet ta` Malta, u dan sabiex filwaqt li tinvestiga l-agir jew in-nuqqasijiet tieghu tghaddi sabiex ukoll tiggudika dan l-istess agir jew nuqqas u tghaddi sabiex timponi fuqu dawk is-sanzjonijiet li jidhrilha xierqa skond l-istess Att ;

2. Illi sussegwentement l-istess Kummissjoni Elettorali permezz ta` stqarrija ghall-istampa mahruga fis-16 ta` Marzu 2017 habbret li se tkun qeghda tahtar bord sabiex jinvestiga l-kazijiet ta` allegat ksur tal-Att dwar il-Finanzjarjament tal-Partiti Politici u li kellha thabbar il-kompozizzjoni ta` dan il-board hekk kif issir il-hatra tal-membri ;

3. Illi sussegwentement matul l-istess xhur gew ippubblikati fil-gazzetti diversi artikli miktuba minn akkademici u studjuzi fil-qasam tad-drittijiet fundamentali dwar din l-investigazzjoni fejn iddikjaraw li l-investigazzjoni u gudizzju li l-Kummissjoni Elettorali kienet se tghaddi fuq zewg partiti inkluz il-Partit rikorrent kienu nieqsa minn fundament legali u kostituzzjonali u cioe li tali process jikser id-drittijiet fundamentali u l-Kostituzzjoni ;

4. Illi nhar is-Sibt 8 ta` April, 2017 gie imxandar fuq l-istazzjon pubbliku televiz, TVM, li 'Imhallef irtirat se jinvestiga allegazzjonijiet dwar ksur tal-ligi tal-finanzjament tal-partiti' ;

5. Illi, nhar it-13 ta` April 2017, f`rapport kunfidenzjali dwar decizjonijiet li jkunu ttiehdu mill-Kummissjoni Elettorali liema rapporti jintbaghtu b`mod regolari lir-rapprezentanti tal-Partiti ghall-Kummissjoni Elettorali, ir-rapprezentant tal-Partit rikorrent ircieva konferma li wara erba` (4) laqghat li kienu inzammu mill-Kummissjoni Elettorali fost id-decizjonijiet li kienu ttiehdu kien anke gie deciz li jitwaqqaf "sotto-kumitat biex jinvestiga l-allegazzjonijiet dwar ksur tal-Att dwar il-Finanzjarament tal-Partiti Politici, liema sotto-kumitat ikun biss "fact finding" ;

6. Illi l-mezzi tax-xandir ukoll irrappurtaw, u ufficjali tal-Partit Nazzjonalista ircevew, kopja ta` ittra li uhud mill-kummissarji li jservu fuq il-Kummissjoni Elettorali baghtu ghall-attenzjoni tal-Eccellenza Taghha l-President ta` Malta, Marie Louise Coleiro Preca, u anke b`kopja kemm lil Prim Ministru Dr Joseph Muscat u anke lill-Kap tal-Oppozizzjoni Dr Simon Busuttil u f`liema huma esprimew it-thassib taghhom dwar id-decizjonijiet li kienu qed jittiehdu fil-Kummissjoni Elettorali relatati mal-investigazzjoni tal-Partiti Politici fosthom il-Partit rikorrent fejn stqarrew li tali decizjonijiet u investigazzjonijiet jivvjolaw il-Kostituzzjoni u d-drittijiet fundamentali ;

7. Illi minn dan kollu l-Partit rikorrent jifhem li huwa jinsab taht investigazzjoni fejn jidher li l-agir jew allegati nuqqasijiet tieghu qeghdin jigu investigati mill-Kummissjoni Elettorali fid-dawl tal-Att dwar il-Finanzjarament tal-Partiti Politici u dan bil-ghan biex l-istess Kummissjoni Elettorali tiggudika l-istess agir jew nuqqas taht dik il-ligi u filwaqt li tghaddi dan il-gudizzju timponi fuq il-Partit rikorrent is-sanzjonijiet li jidhrilha xierqa ;

8. Illi pero` sal-mument meta gie intavolat dan ir-rikors il-Partit rikorrent qatt ma rcieva avviz car li jindika ghal liema reat u taht liema artikolu tal-Att dwar il-Finanzjarament tal-Partit Politici huwa qieghed jigi investigat;

<u>L-Att dwar il-Finanzjarjament tal-Partiti Politici</u>

9. Illi skond l-Att dwar il-Finanzjarjament tal-Partiti Politici l-Kummissjoni Elettorali ghandha l-poter li tinvestiga, tiggudika u timponi sanzjonijiet fejn hi jidhrilha li partit politiku jkun wettaq xi wiehed mir-reati imsemmija fl-Att jew ikun hati ta` xi nuqqas taht l-istess Att ;

10. Illi l-Att dwar il-Finanzjarjament tal-Partiti Politici jaghti dawn il-funzjonijiet lill-Kummissjoni Elettorali ghal kull reat preskritt fl-istess Att u b`mod specifiku fosthom f`artikolu 22(2) u f`artikolu 37(4) jindika bic-car li l-Kummissjoni ghandha dawn it-tlett poteri flimkien ;

11. Illi l-artikolu 44(2) u l-artikolu 18 tal-istess Att ikompli jsahhah l-ghoti ta` dawn it-tlett poteri lill-Kummissjoni Elettorali meta jaghti lil partiti politici il-possibilita li jikkontestaw punizzjoni imposta mill-Kummissjoni ;

12. Illi l-Att dwar il-Finanzjarjament tal-Partiti Politici ma jaghti l-ebda setgha lill-Kummissjoni Elettorali tabdika jew tiddelega, la in toto u l-anqas in parte, xi wahda mill-funzjonijiet taghha lil persuni li ma humiex membri tal-istess Kummissjoni kif jigu mahtura skond il-Kostituzzjoni ;

13. Illi l-istess Att jaghti lill-Kummissjoni Elettorali biss is-setgha li tahtar awditur jew awdituri sabiex jassistuha fl-ezekuzzjoni tal-qadi tal-funzjonijiet moghtiha lilha taht Parti III u IV tal-Att, hekk kif huwa preskritt f`artikolu 45 ;

14. Illi l-Att dwar il-Finanzjarjament tal-Partiti Politici jistabilixxi diversi reati u penali ghal liema wiehed jista` jigi investigat, iggudikat u ppenalizzat mill-Kummissjoni Elettorali ;

15. Illi l-penali ghar-reati stabbiliti fl-istess Att ivarjaw fl-ammont u jistghu skont l-artikolu 44(c) jammontaw sa` hamsin elf ewro (€50,000) u jistghu jinkludu maghhom is-sospensjoni ta` ufficjal tal-Partit mil-kariga tieghu ;

16. Illi l-istess Att dwar il-Finanzjarjament tal-Partiti Politici ukoll jistabbilixxi, bhal per ezempju f`artikolu 24, li sahansitra jigu imposti fuq ufficjali tal-Partiti Politici penalitajiet u punizzjonijiet kif stabbiliti fil-Kodici Kriminali ;

Aggravji

Nemo judex in causa sua

17. Illi fejn l-Att dwar il-Finanzjarjament tal-Partiti Politici jaghti lill-Kummissjoni Elettorali tlett funzjonijiet li hija trid tinvestiga, tghaddi gudizzju u taghti punizzjoni, il-Kummissjoni Elettorali qeghda tigi awtorizzata sabiex tinvestiga, takkuza, tiggudika u timponi kemm penali sostanzjali u kif ukoll sanzjonijiet ta` certu gravita` u entita` fuq il-Partit rikorrent jew ufficjali tieghu f`cirkostanzi fejn l-istess Kummissjoni Elettorali hija "judex in causa sua" ;

18. Illi ghalhekk il-qadi ta` tali funzjonijiet mill-Kummissjoni Elettorali jaghmlu lill-istess Kummissjoni l-investigatur, il-prosekuzzjoni u l-gudikant f`organu wiehed b`tali mod li jippregudika d-dritt tar-rikorrent ghal smigh xieraq quddiem tribunal indipendenti u imparzjali ;

19. Illi dan jammonta ghal ksur tal-artikolu 6 tal-Konvenzjoni Ewropea kif inkorporat fil-ligi ta` Malta permezz tal-Att dwar il-Konvenzjoni Ewropea, Kapitolu 319 tal-Ligijiet ta` Malta u tal-artikolu 39 tal-Kostituzzjoni ta` Malta ;

Kummissjoni Elettorali mhix Qorti

20. Illi n-natura tar-reati u l-penali imposti fl-Att dwar il-Finanzjarjament tal-Partiti Politici hija wahda ta` "akkuza" fit-termini tad-dritt ghal smigh xieraq kif protett fl-artikolu 6 tal-Konvenzjoni Ewropea u l-artikolu 39 tal-Kostituzzjoni u li l-process innifsu, indipendentement minn kull decizjoni li tista` tittiehed, huwa fic-cirkostanzi kollha tal-kaz bi ksur tal-jedd ghal smigh xieraq ghax process li jista` jwassal ghal kundanna meqjusa bhala wahda ta` natura penali qieghed jitmexxa quddiem korp li ma huwiex 'qorti' ;

21. Illi inoltre in kwantu l-Kummissjoni Elettorali ghandha l-poter li ssejjah ufficjali tal-Partit rikorrent sabiex jaghtuha informazzjoni li tghinha fl-investigazzjoni taghha, dan il-poter fih innifsu jista` jesponi lill-istess ufficjali tal-Partit jew lil Partit innifsu ghal akkuzi, gudizzju u sanzjonijiet ta` natura penali izda minghajr ma joffrilhom is-salvagwardi tad-dritt ghal smigh xieraq, u dan bi ksur tal-artikolu 39 tal-Kostituzzjoni u l-artikolu 6 tal-Konvenzjoni Ewropea ;

22. Illi fi kwalunkwe kaz u minghajr pregudizzju ghall-premess, il-Kummissjoni Elettorali ma hix qorti jew awtorita` li tiggudika li hija imparzjali u/jew indipendenti skond l-artikolu 39 (1) tal-Kostituzzjoni u artikolu 6 tal-Konvenzjoni Ewropeja tad-Drittijiet tal-Bniedem u dan fost ragunijiet ohra, ghaliex il-membri taghha ma ghandhom ebda sigurta` tal-kariga u inhatru mill-Ezekuttiv u jiddependu minnu ghat-tigdid tal-kariga taghhom ;

<u>Akkuza mhux maghrufa</u>

23. Illi minkejja li l-Kummissjoni Elettorali habbret li qeghda tinvestiga l-Partit rikorrent fuq allegazzjonijiet ta` ksur tal-Att dwar il-Finanzjarjament tal-Partiti Politici, ir-rikorrent ma rcieva l-ebda tahrika jew akkuza jew avviz formali li tindikalu liema hu r-reat li ghalih qieghed jigi investigat ;

24. Illi ghalhekk filwaqt li l-Partit rikorrent u l-ufficjali tieghu qeghdin jitqeghdu taht investigazzjoni, li tista` twassal ghall-akkuza b`xi reat preskritt fl-imsemmi Att, li jista jwassal ghal punizzjoni ta` multa sa mhux aktar minn hamsin elf ewro (€50,000), sospensjoni mill-kariga jew ghal penali preskritti fil-Kodici Kriminali, huma ma jistghux jassiguraw li jigi salvagwardat d-dritt ghal smigh xieraq bil-garanziji li tali dritt igib mieghu fosthom li tircievi avviz car bl-akkuza, il-prezunzjoni tal-innocenza u anke l-preparazzjoni ta` difiza xierqa ;

25. Illi konsegwentement anke dan jammonta ghal ksur tal-artikolu 6 tal-Konvenzjoni Ewropea kif inkorporat fil-ligi ta` Malta permezz tal-Att dwar il-Konvenzjoni Ewropea, Kapitolu 319 tal-Ligijiet ta` Malta u tal-artikolu 39 tal-Kostituzzjoni ta` Malta ;

<u>Abdikazzjoni tal-Funzjonijiet u Delegazzjoni ta` Poteri</u>

26. Illi jidher li l-Kummissjoni Elettorali ddecidiet li taqdi t-tlett funzjonijiet taghha, u cioe li tinvestiga, tiggudika u tissanzjona, billi tahtar dak li hi ssejjah "sotto-kumitat biex jinvestiga l-allegazzjonijiet dwar ksur tal-Att dwar il-Finanzjarjament tal-Partiti Politici, liema sotto-kumitat ikun biss 'fact finding" u ghalhekk tali sotto-kumitat qieghed jiehu fuqu ir-rwol tal-investigazzjoni bil-ghan li jigbor provi ;

27. Illi jidher mill-istqarrija ghall-istampa mahruga mill-Kummissjoni Elettorali fis-16 ta` Marzu 2017 li dan is-sotto-kumitat se jkollu bhala membri persuni li ma humiex kummissarji mahtura fil-Kummissjoni Elettorali skond il-Kostituzzjoni ;

28. Illi ghalhekk il-Kummissjoni Elettorali qeghda taghti lil ohrajn parti mill-funzjoni li l-Att dwar il-Finanzjarjament tal-Partit jimponi fuqha biex taqdi hi stess ;

29. Illi sussegwentement il-Kummissjoni Elettorali qeghda tiddelega wahda mit-tlett funzjonijiet moghtija lilha, u cioe dik li tinvestiga u tigbor il-fatti, lil terzi kontra dak li jipprovdi l-Att dwar il-Finanzjarjament tal-Partiti Politici kemm billi l-istess Att kif fuq premess ma jaghtihiex il-poter li tiddelega l-funzjonijiet taghha la in toto u l-anqas in parte, kif ukoll ghaliex l-istess Att ma jippermettiliex tahtar persuni terzi oltre awditur ;

30. Illi anke fil-hatra ta` awditur fuq is-sotto-kumitat in kwistjoni l-Kummissjoni Elettorali qeghda tiddelega u tabdika l-funzjonijiet taghha kontra l-istess Att, billi l-artikolu 45 jippermettielha tahtar awditur biss biex jghina taqdi l-funzjonijiet taghha u mhux biex huwa jwettaq il-funzjonijiet tal-Kummissjoni Elettorali ;

31. Illi l-istess Att ma jippermettiex lanqas li l-Kummissjoni Elettorali tahtar sotto-kumitati fi hdanha ghal ghan li tinvestiga allegazzjonijiet ta` ksur tal-Att dwar il-Finanzjarjament tal-Partiti Politici ;

32. Illi ghalhekk id-delegazzjoni ta` din il-funzjoni mill-Kummissjoni Elettorali lil terzi mahtura fuq sotto-kumitat taghha kontra l-istess Att jaghmel dik il-hatra u abdikazzjoni ta` poter vjolazzjoni tad-dritt tar-rikorrent ghal smigh xieraq li jitlob smigh minn tribunal imwaqqaf b`ligi

33. Illi dan jammonta ghal ksur tal-artikolu 6 tal-Konvenzjoni Ewropea kif inkorporat fil-ligi ta` Malta permezz tal-Att dwar il-Konvenzjoni Ewropea, Kapitolu 319 tal-Ligijiet ta` Malta u tal-artikolu 39 tal-Kostituzzjoni ta` Malta ;

<u>Nuqqas ta` garanziji ta` imparzjalita u indipendenza tas-sotto-kumitat</u>

34. Illi s-sotto-kumitat mahtur ma jgawdi l-ebda garanziji ta` indipendenza jew imparzjalita u l-membri li ma humiex kummissarji tal-Kummissjoni Elettorali ma jgawdu l-ebda security of tenure, huma mahtura ad hoc, u xejn ma jzommom milli jaqdu hatriet jew xogholijiet ohra moghtija lilhom minn xi organu tal-Gvern ;

35. Illi ghalhekk f`dak li dan is-sotto-kumitat ma jgawdiex il-protezzjonijiet mehtiega biex jassiguraw li n-natura tieghu tkun wahda imparzjali u indipendenti tammonta ghal ksur tad-dritt ghal smigh xieraq u konsegwentement vjolazzjoni tal-artikolu 6 tal-Konvezjoni Ewropea kif inkorporat fil-ligi ta` Malta permezz tal-Att dwar il-Konvenzjoni Ewropea, Kapitolu 319 tal-Ligijiet ta` Malta u tal-artikolu 39 tal-Kostituzzjoni ta` Malta ;

36. Illi ghalhekk f`dak li l-membri tas-sotto-kumitat jista` jkollhom jew ghandhom hatriet jew xogholijiet ohra moghtija lilhom mill-gvern immexxi minn partit politiku li huma issa qeghdin jigu mitluba jinvestigaw, u in oltre li dan qieghed isir f`sistema parlamentari b`zewg partiti iggib fix-xejn dak l-element ta` indipendenza u imparzjalita li oggettivament ghandu jkollu kull persuna mahtura biex tinvestiga reati taht l-Att dwar il-Finanzjarjament tal-Partiti Politici ;

37. Illi konsegwentement dan ukoll jammonta ghal ksur tad-dritt tar-rikorrent ghal smigh xieraq u cioe ksur tal- artikolu 6 tal-Konvezjoni Ewropea kif inkorporat fil-ligi ta` Malta permezz tal-Att dwar il-Konvenzjoni Ewropea, Kapitolu 319 tal-Ligijiet ta` Malta u tal-artikolu 39 tal-Kostituzzjoni ta` Malta.

<u>Talbiet</u>

Ghaldaqstant ir-rikorrent jitlob lil dina l-Onorabbli Qorti joghgobha tiddikjara li :

1. In kwantu l-Kummissjoni Elettorali ghandha l-funzjonijiet li tinvestiga, takkuza, tiggudika u timponi penali fuq il-Partit rikorrent b`tali mod li hija ssir judex in causa sua jammonta ghal ksur tal-artikolu 39 tal-Kostituzzjoni ta` Malta u tal-artikolu 6 tal-Konvenzjoni Ewropea kif inkorporata fil-Ligijiet ta` Malta permezz ta` Kapitolu 319.

2. In kwantu l-process innifsu, indipendentement minn kull decizjoni li tista` tittiehed jammonta fic-cirkostanzi kollha tal-kaz ghal ksur tal- artikolu 39 tal-Kostituzzjoni ta` Malta u tal-artikolu 6 tal-Konvenzjoni Ewropea kif inkorporata fil-Ligijiet ta` Malta permezz ta` Kapitolu 319 u cioe tad-dritt ghal smigh xieraq ghax process li jista` jwassal ghal kundanna meqjusa bhala wahda ta` natura penali qieghed jitmexxa quddiem korp li ma huwiex "qorti".

3. In kwantu l-process innifsu kif immexxi mill-Kummissjoni Elettorali bhala bord li jiddeciedi u jissanzjona minghajr garanziji ta` indipendenza u imparzjalita kif mehtieg fid-dritt ghal smigh xieraq, jammonta ghal ksur tal- artikolu 39 tal-Kostituzzjoni ta` Malta u tal-artikolu 6 tal-Konvenzjoni Ewropea kif inkorporata fil-Ligijiet ta` Malta permezz ta` Kapitolu 319.

4. In kwantu l-Kummissjoni Elettorali ghandha l-poter li ssejjah ufficjali tal-Partit rikorrent sabiex jaghtuha informazzjoni, dan il-process jesponi lil Partit rikorrent, u anke lill-ufficjali tieghu ghal akkuzi, gudizzju u sanzjonijiet ta` natura penali minghajr ma joffrilhom is-salvagwardi tad-dritt ghal smigh xieraq u dan jammonta ghal ksur tal-artikolu 39 tal-Kostituzzjoni ta` Malta u tal-artikolu 6 tal-Konvenzjoni Ewropea kif inkorporata fil-Ligijiet ta` Malta permezz ta` Kapitolu 319.

5. In kwantu l-Partit rikorrent tqieghed taht investigazzjoni izda ma rceva l-ebda tahrika jew akkuza li tindikalu liema hu r-reat li ghalih qieghed jigi investigat jammonta ghal ksur tal-artikolu 39 tal-Kostituzzjoni ta` Malta u tal-artikolu 6 tal-Konvenzjoni Ewropea kif inkorporata fil-Ligijiet ta` Malta permezz ta` Kapitolu 319 billi ma jistghux jigu assigurati l-garanziji li d-dritt ghal smigh xieraq igib mieghu.

6. In kwantu l-Kummissjoni Elettorali hattret terzi persuni sabiex iwettqu l-investigazzjoni li skond l-Att dwar il-Finanzjarjament tal-Partiti Politici hija funzjoni li tispetta lilha biss, din abdikat u d-delegat il-poter taghha b`tali mod li hatret sotto-kumitat kontra l-ligi u liema ma huwiex imwaqqaf b`ligi u dan bi ksur tad-dritt ghal smigh xieraq sancit fl-artikolu 39 tal-Kostituzzjoni ta` Malta u tal-artikolu 6 tal-Konvenzjoni Ewropea kif inkorporata fil-Ligijiet ta` Malta permezz ta` Kapitolu 319.

7. In kwantu l-process quddiem is-sotto kumitat mahtur kontra l-ligi mill-Kummissjoni Elettorali, dan is-sotto kumitat u l-membri mahtura fih ma jgawdix dawk il-garanziji mehtiega biex jassiguraw il-garanziji ta` qorti jew tribunal kif jitlob id-dritt ghal smigh xieraq u ghalhekk tiddikjara ksur

tal- artikolu 39 tal-Kostituzzjoni ta` Malta u tal-artikolu 6 tal-Konvenzjoni Ewropea kif inkorporata fil-Ligijiet ta` Malta permezz ta` Kapitolu 319.

U tghaddi sabiex taghti dawk ir-rimedji li jidhrilha xierqa u opportuni fosthom :

8. Li tiddikjara kull procedura li tkun ittiehdet fil-konfront tal-Partit Nazzjonalista, bhala l-Partit rikorrent, bhala li jiksru d-dritt ghal smigh xieraq kif garantit f`artikolu 39 tal-Kostituzzjoni ta` Malta u tal-artikolu 6 tal-Konvenzjoni Ewropea kif inkorporata fil-Ligijiet ta` Malta permezz ta` Kapitolu 319.

9. Li tiddikjara kull procedura li tkun ittiehdet fil-konfront tal-Partit Nazzjonalista, bhala l-Partit rikorrent mill-Kummissjoni Elettorali kif fuq premess, bhala nulli u bla effett.

Bl-ispejjez kontra l-intimati.

Rat id-dikjarazzjoni guramentata ta` Rosette Thake, il-lista tax-xhieda tar-rikorrenti u l-elenku tad-dokumenti.

Rat ir-risposta tal-Kummissjoni Elettorali prezentata fid-9 ta` Mejju 2017 li taqra hekk :-

Illi fir-rigward tal-ilmenti sollevati mir-rikorrenti fir-rikors taghhom fl-ismijiet premessi l-Kummissjoni Elettorali illimitat ruha biss biex tinvestiga allegazzjonijiet li saru fil-pubbliku dwar il-finanzjament tal-partiti politici u ghadha ma hadet l-ebda decizjoni li ssejjah xi parti jew persuna biex jidher quddiemha biex jirrispondi ghal xi ghemil hazin u dan precizament ghaliex ma tafx x`sustanza jista` jkollha l-allegazzjonijiet li saru fil-pubbliku. Dan jista` jigi espurat fil-kors ta` investigazzjoni. Il-Kummissjoni ghandha d-dover li tinvestiga, dan id-dover hu impost fuqha mil-ligi ; il-ligi bl-ebda mod ma tirrestringi lill-Kummissjoni dwar il-modalita b`liema ghandha tinvestiga u ghalhekk precizament kien li l-Kummissjoni li qabdet sotto-kumitat biex jigbor dik l-informazzjoni li tkun tista` tingabar biex imbaghad l-istess Kummissjoni tkun tista` hija b`mod imparzjali u indipendenti tiddeciedi biex tara ghandhiex issejjah lil xi persuna jew lil xi partit biex jirrispondi ghall-ghemil tieghu u b`hekk tkun taghat kull opportunita` lil min jigi lilu addebitat xi nuqqas li jiddefendi l-pozizzjoni tieghu minghajr ma l-Kummissjoni tkun ga hadet l-ebda pozizzjoni fir-rigward. Il-kummissjoni ma

hija tiddelega l-ebda funzjoni lilha fdata u fiha investigata mill-ligi. Kwalsijasi konkluzjoni li tista` trid tingibed wara li l-fatti jkunu ga gew investigati tibqa` unikament u biss fil-poter tal-Kummissjoni u s-sotto-kumitat huwa biss imqabbad li jigbor fatti li jistghu jkunu rilevati u li jigiebu minnu ghak-konjizzjoni tal-Kummissjoni minghajr ma jiehu ebda decizzjoni fir-rigward u dan precizament biex il-Kummissjoni taqdi l-funzjoni fuqha imposta mill-ligi li tinvestiga, xejn izjed u xejn inqas. Il-Kummissjoni trid thaddem il-ligi kif maghmula mill-Parlament ta` Malta b`mod li waqt li taghti effett shih lilha tara li ma tiksirx d-drittijiet fundamentali tal-ebda bniedem. Ghalhekk il-Kummissjoni mxiet bi prudenza u llimitat ruha ghalissa biss li tinvestiga l-allegazzjonijiet.

Il-Kummissjoni thoss li l-ilment tar-rikorrent huwa verament indirizzat mhux ghal mod kif il-Kummissjoni qieghda tinterpreta u thaddem il-ligi imma ghal-ligi nnifisha u ghal dan ghandu jirrispondi mhux il-Kummissjoni imma l-Avukat Generali. Illi ghalhekk in kwantu l-pozizzjoni tar-rikorrenti timplika li l-ligi twassal ghal ksur tad-drittijiet fundamentali, l-Kummissjoni ma hiex il-persuna legittima li ghandha tirrispondi ghal dan u ghandu jirrispondi ghal dan l-Avukat Generali.

Il-Kummissjoni taqdi l-funzjoni taghha hekk kif stabbilit mill-ligi, fil-parametri stabbiliti u determinati mill-ligi u b`mod imparzjali u indipendenti minn kull Awtorita ohra kif trid l-istess Kostituzzjoni u f`dan is-sens ma tikser id-dritt fundamentali ta` hadd. Dwar jekk il-ligi twassalx ghall-ksur tad-dritt fundamentali jew le, l-persuna li ghandha tirrispondi ghal tali kweziet huma l-Avukat Generali u mhux il-Kummissjoni Elettorali.

Ghalhekk it-talbiet tar-rikorrenti huma infondati fil-fatt u fid-dritt u ghandhom jigu respinti.

Rat ir-risposta tal-Avukat Generali prezentata fil-15 ta` Mejju 2017 li taqra hekk :-

Illi l-lanjanzi tar-rikorrenti huma fis-sens illi minn rapporti li hargu fil-mezzi tax-xandir u minn informazzjoni li r-rikorrenti rcieva minn kummissarji li jservu fuq il-Kummissjoni intimate l-Partit rikorrent jifhem li huwa jinsab taht investigazzjoni fejn idher li l-agir jew allegati nuqqasijiet tieghu qeghdin jigu investigati mill-Kummissjoni Elettorali fid-dawl tal-Att dwar il-Finanzjament tal-Partiti Politici u dan bil-ghan biex l-istess Kummissjoni Elettorali tiggudika l-istess agir jew nuqqas taht dik il-ligi u filwaqt li tghaddi dan il-gudizzju timponi fuq il-Partit rikorrent is-sanzjonijiet li jidhrilha xierqa" u li allegatament l-poteri moghti mill-Att dwar

il-Finanjament tal-Partiti (Kapitolu 544 tal-Ligijiet ta` Malta) lill-Kummissjoni Elettorali jivvjolaw id-dritt ghal smigh xieraq protett permezz tal-Artikolu 6 tal-Konvenzjoni Ewropeja u l-Artikolu 39 tal-Kostituzzjoni tar-rikorrenti u dan stante li skont ir-rikorrenti tali poteri jiksru l-principju ta` nemo judex in causa sua, kundanna meqjusa ta` natura penali qieghdha titmexxa quddiem korp li mhux "qorti", ksur tal-principju ta` indipendenza u imparzjalita; nuqqas ta` gharfien tal-akkuza; u abdikazzjoni tal-funzjonijiet u delegazzjoni ta` poteri. Illi bhala rimedju qed jintalab li tinghata dikjarazzjoni ta` lezjoni kif ukoll jigi dikjarat li l-azzjoni mehuda mill-Kummissjoni intimata fil-konfront tal-Partit rikorrenti hija wahda nulla u bla effett.

Illi l-esponenti jikkontestaw l-allegazzjonijiet u l-pretensjonijiet tar-rikorrenti stante li huma nfondati fil-fatt u fid-dritt ghar-ragunijiet segwenti :

1. Illi in linea preliminari, l-esponenti jeccepixxi n-nuqqas ta` applikabbilita` tal-Artikoli 39 tal-Kostituzzjoni u 6 tal-Konvenzjoni Ewropeja dwar id-Drittijiet tal-Bniedem u dan peress illi d-drittijiet ta` smiegh xieraq applikabbli skont dawk l-Artikoli japplikaw biss ghal organi li jiddeterminaw drittijiet jew obbligi civili jew akkuzi kriminali u l-Kummissjoni intimata ma ghandhiex dawk il-funzjonijiet.

2. Illi in linea preliminari wkoll, l-esponenti jeccepixxi li ghal dak li jirrigwarda l-jedd ta` smigh xieraq, il-Qrati taghna kif ukoll ta` Strasburgu dejjem irritenew illi sabiex japplikaw l-Artikolu 39 tal-Kostituzzjoni u l-Artikolu 6 tal-Konvenzjoni Ewropeja rispettivament jridu tabilfors jitqiesu l-fatturi processwali partikolari tal-kaz, b`mod illi biex jiddeterminaw jekk kienx hemm ksur tal-jedd ta` smigh xieraq, iridu jqisu l-process kollu kemm hu fl-assjem tieghu. Dan ifisser li l-Qorti ma tistax u m`ghandhiex tiffoka fuq bicca wahda mill-process shih gudizzjarju biex minnu jekk issib xi nuqqas tasal ghall-konkluzjoni li tabilfors sehh ksur tal-jedd ghas-smigh xieraq (ara Adrian Busietta vs Avukat Generali deciza mill-Qorti Kostituzzjonali fit-13 ta` Marzu 2006 u Dimech v. Malta deciza mill-Qorti Ewropeja fit-2 ta` April 2015). In vista ta dan it-taghlim, l-esponenti jirrilevaw li t-talba fir-rikors promotur hija wahda intempestiva u prematura tenut kont li l-proceduri li fuqhom qieghed jibni l-lanjanza tieghu ir-rikorrenti, jekk fil-fatt inbdew, certament li ghadhom mhumiex konkluzi u ghalhekk ghandha tigi dikjarata bhala intempestiva minn dina l-Onorabbli Qorti.

3. Illi fil-mertu u minghajr pregudizzju ghas-suespost, l-esponenti jibda` biex jissottometti li l-Artikolu 39 tal-Kostituzzjoni jipprovdi illi sabiex jigi garantit id-dritt ghal smigh xieraq, is-smigh ghandu jsir fi zmien ragonevoli u jinstema` minn Qorti indipendenti u imparzjali mwaqqfa bil-ligi.

L-Artikolu 6 tal-Konvenzjoni jmur oltre meta jipprovdi li s-smigh ghandu jkun pubbliku u jista` jsir quddiem tribunal indipendenti u imparzjali imwaqqaf bil-ligi. L-esponenti jirrileva illi ma sar xejn matul il-process adoperat mill-Kummissjoni intimata li b`xi mod seta` jincidi fuq id-dritt tar-rikorrenti ta` process gust.

Illi r-rikorrenti qed jallega li l-Att dwar il-Finanzjament tal-Partiti Politici (Kap. 544 tal-Ligijiet ta` Malta) "jaghti lill-Kummissjoni Elettorali tlett funzjonijiet li hija trid tinvestiga, taghddi gudizzju u taghti punizzjoni" li allegatament jrendu lill-Kummissjoni judex in causa sua. L-esponenti jissottometti li l-poteri naxxenti mill-Kap. 544 tal-Ligijiet ta` Malta huma poteri li l-legislatur jaghti lill-Kummissjoni sabiex jassigura l-principju ta` trasparenza u dan sabiex ikun hemm assigurazzjoni lecita tal-provenjenza tal-flejjes li bihom ikunu qed jigu finanzjati l-partiti politici f`Malta. Illi l-obbligu tat-tharis tal-provvedimenti tal-Kap. 544 jinkombi fuq il-partiti politici u l-funzjoni tal-Kummissjoni hija biss li tassigura ruhha li l-partiti politici jaderixxu mal-obbligi taghhom kif hekk stabbiliti. Il-fatt fih innifsu li l-Kummissjoni hija fdata mill-legislatur sabiex tinvestiga u titlob informazzjoni mill-partiti politici jew persuni ohra sabiex tistabbilixi s-sors tad-donazzjonijiet bl-ebda mod ma jikser id-dritt ghal smigh xieraq. Certament li f`dan l-istadju ta` investigazzjoni ma hemm l-ebda dritt jew obbligu civili li jkun qieghed jigi determinat jew xi akkuza kriminali. Dak li jkun qieghed isir huwa biss sorveljanza u monitoragg sabiex jigi assigurat li dawk l-obbligi li timponi l-ligi jigu mharsa mill-partiti politici.

Illi certament li l-Kummissjoni bl-ebda mod ma tista` tigi kunsidrata li qed tikser il-principju ta` gustizzja naturali nemo judex in causa sua u dan stante li l-istess Kummissjoni ma tkun qed tirreka l-ebda vantagg ghaliha meta tirravviza nuqqas minn xi partit politiku anzi l-funzjoni taghha hija kunsidrata wahda ta` ordni pubbliku u dan sabiex tassigura s-sors tad-donazzjonijiet. Illi fi kwalunkwe kaz, l-istess Kap. 544 tal-Ligijiet ta` Malta jahseb ghall-access tal-qrati fejn partiti politici u kull persuna interessata tista` tikkontesta kull sejbien ta` nuqqas ta` tharis tad-disposizzjonijiet tal-Kap. 544 kif ukoll l-imposizzjoni ta` penali amministrattivi jew sanzjonijiet imposti mill-Kummissjoni u dan billi jigi intavolat rikors guramentat fi zmien tletin gurnata mill-imposizzjoni tal-multa jew sanzjoni.

Illi ghal dak li jirrigwarda l-allegazzjoni li l-Kummissjoni mhijiex "qorti" ai termini tal-Artikolu 6 tal-Konvenzjoni Ewropeja u l-Artikolu 39 tal-Kostituzzjoni ta` Malta, l-esponenti jissottometti li fil-gurisprudenza tal-Qorti Ewropea ghad-Drittijiet tal-Bniedem minn dejjem inzammet id-distinzjoni bejn pieni li jaqghu fil-kategorija ta` "hard core of criminal law" u "cases not strictly belonging to the traditional categories of the criminal law". Illi multi amministrattivi mnissla mil-ligi tad-dwana, minn proceduri dixxiplinari fil-

habs, mill-ligi tal-kompetizzjoni u mill-ligijiet fiskali kollha kemm huma tqisu li ma jappartjenux lill-kategoriji tradizzjonali li jaqghu taht il-ligi kriminali u allura f`dawn il-kazijiet "the criminal head guarantees will not necessarily apply with their full stringency" (ara fost ohrajn Société Stenuit vs. Franza tas-27 ta` Frar 1992 u Bendenoun vs. Franza tal-24 ta` Frar 1992). Ghalhekk f`dawn ic-cirkostanzi billi l-kaz involut f`din il-vertenza mhuwiex `hard core of criminal law` allura m`hemmx ghalfejn li jkun hemm proceduri li jitmexxew quddiem qorti.

Illi ma hemm xejn hazin mal-principji tal-jedd ta` smiegh xieraq li l-impozizzjoni ta` pieni amministrattivi jigu imposti minn organi li jkollhom setghat kemm investigattivi u kemm li jaghti decizjonijiet (ara Janosevic vs. L-lsvezja deciza fil-21 ta` Mejju 2003). Illi sakemm id-decizjoni tal-Kummissjoni intimata tkun tista` tigi mistharrga u sindikata minn awtorità moghnija b`funzjonijiet gudizzjarji allura ma hemm l-ebda problema mal-htigijiet tas-smiegh xieraq. Illi skont il-gursprudenza tal-Qorti Ewropea tad-Drttijiet tal-Bniedem, ara Janosevic vs L-Isvezja, huwa kompatibbli ma Artikolu 6 tal-Konvenzjoni Ewropea ghall-awtorita` li tghaqqad poter investgattv u tehid ta decizjonijiet bhall-Kummissjoni sakemm hemm access komplet ghall-qorti "before a judicial body that has full jurisdiction, including the power to quash in all respects, on questions of fact and law, the challenged decision` Fi kliem iehor, huwa biss jekk ma jestix dritt ta` access ghall-qorti mid-decizjoni tal-Kummissjoni li wiehed jista` jitkellem fuq potenzja ksur tal-jedd ta` smiegh xieraq. Bil-kontra jekk wiehed skont il-ligi ordinarja jkun jista` jattakka d-decizjoni tal-Kummissjoni quddiem organu gudizzjarju allura ma jkun hemmx problemi mal-jedd ta` smiegh xieraq – access li l-Kap. 544 tal-Ligijiet ta` Malta jipprovdi.

Illi ghal dak li jirrigwarda l-allegazzjoni li r-rikorrenti ma ghandux gharfien tat-tahrika jew akkuza li jindika n-nuqqas tieghu, l-esponenti jissottometti li fl-istadju tal-investigazzjoni dak li tkun qed taghmel il-Kummissjoni huwa biss li tigbor informazzjoni izda f`dak l-istadju certament ma tkunx tista` tippunta subghajha lejn hadd ghal xi nuqqas. Se mai, jekk mill-investigazzjoni jidher li jkun hemm xamma ta` xi nuqqas, ikun f`dan l-istadju sussegwenti li l-partit koncernat jigi nfurmat b`tali nuqqas u mitlub iwiegeb ghal tali nuqqas qabel tittiehed xi decizjoni. Ghalhekk, f`dan l-istadju dak li qed jippretendi r-rikorrenti li jsir mhuwiex possibbli u dan stante li l-pass li fih tinsab fiha l-Kummissjoni hija dik investigattiva.

Illi ghal dak li jirrigwarda l-allegazzjoni ta` abdikazzjoni tal-funzjoni u delegazzjoni ta` poteri li allegatament ghamlet il-Kummissjoni lil sotto-kumitat li gie ffurmat mill-istess Kummissjoni intimata, l-esponenti jissottometti li l-fatt li l-Kummissjoni ghazlet li l-informazzjoni tingabar minn sotto-kumitat li jirrispondi lejha bl-ebda mod ma qieghed jikser id-dritt

ghal smigh xieraq. Illi ma jidhirx li dan is-sotto-kumitat b`xi mod ser jissostitwixxi lill-Kummissjoni fil-qadi tad-doveri taghha izda huwa ntiz biss sabiex jigbor informazzjoni taht id-direzzjoni tal-Kummissjoni liema informazzjoni tghaddi lill-Kummissjoni sabiex jevalwa tali informazzjoni ma jfissirx li b`xi mod qeghdin jigu delegati funzjonijiet li jispettaw lill-Kummissjoni u wisq inqas jista` jigi meqjus li xxelfu l-garanziji ta` smigh xieraq.

Illi ghal dak li jirrigwarda l-allegazzjoni ta` nuqqas ta` garanziji ta` imparzjalita` u indipendenza tas-sotto-kumitat, l-esponenti jissottometti certament li l-garanziji ta` imparzjalita` u indipendenti jridu jigu sodisfatti minn dak l-organu li ghandu jiehu decizjoni. Illi kif diga` ntqal hawn fuq, is-sotto-kumitat li jwiegeb lill-Kummissjoni bl-ebda mod mhu ser jiddeciedi l-ebda kwistjoni u dan stante li xogholu huwa limitat u cirkoskritt biss ghall-gbir ta` l-informazzjoni li l-Kummissjoni tidderigih li ghandu jigbor: xejn inqas u xejn aktar. Illi kull decizjoni tispetta lill-Kummissjoni liema Kummissjoni hija munita` fi kwalunkwe kaz bil-garanziji ta` indipendenza u imparzjalita` u dan stante li hija organu kostituzzjonali li mhijiex suggetta ghall-ebda ndhil jew kontroll kif stabbilit mill-Artikolu 60(7) tal-Kostituzzjoni ta` Malta.

Illi jsegwi ghalhekk li l-lanjanzi tar-rikorrenti ghandhom jigu michuda.

4. Salv eccezzjonijiet ulterjuri.

5. Bl-ispejjez.

Semghet ix-xiehda u rat il-provi l-ohra li tressqu fil-kors tal-kawza.

Rat in-noti ta` osservazzjonijiet li pprezentaw il-partijiet.

Semghet is-sottomissjonijiet tal-ahhar bil-fomm li saru fl-udjenza tat-12 ta` Frar 2018.

Rat illi l-kawza thalliet ghas-sentenza ghal-lum.

Rat l-atti l-ohra tal-kawza.

II. Provi

Joseph Church - Kummissjonarju Elettorali Ewlieni sa mis-6 ta` Frar 2014 – xehed illi l-Kummissjoni Elettorali **('Il-Kummissjoni')** bdiet tittratta l-ilmenti li rceviet dwar ksur tal-Ligi tal-Finanzjament ta` l-Partiti Politici **('Kap 544')** waqt laqgha straordinarja li saret fl-10 ta` Marzu 2017. Irceviet bil-miktub (a) fil-21 ta` Frar 2017 allegazzjoni minn Alternattiva Demokratika dwar uzu hazin mill-Partit Laburista tal-Palazz tal-Girgenti ; (b) fl-10 ta` Marzu 2017 allegazzjoni mill-Partit Laburista permezz tad-delegat tieghu Louis Gatt illi l-Partit Nazzjonalista kien ircieva donazzjonijiet illegali minghand Db Group ; u (c) fl-10 ta` Marzu 2017 allegazzjoni mill-Partit Nazzjonalista permezz tas-Segretarju Generali Rosette Thake li l-Partit Laburista ma kienx irregistra bhala partit, ma kienx ipprezenta dettalji dwar id-donazzjonijiet, u li kellu mieghu jahdmu persuni li kienu mhallsin mit-taxxi li jigbor il-pajjiz.

Xehed illi waqt din il-laqgha, il-Kummissjoni sejhet lill-konsulent legali taghha l-Prof Ian Refalo sabiex jaghtiha parir dwar it-tlett ilmenti. Il-Kummissjoni nghatat parir sabiex jinhatar sotto-kumitat biex jaghmel rapport dwar kull ilment wara li jkun sema` x-xhieda kollha. Prof Refalo ghamilha cara li l-Kap 544 ma kienx car fejn huma koncernati s-setghat tal-Kummissjoni, u allura kienet qed tinholoq incertezza dwar x` kien ser ikun l-obbligu tal-Kummissjoni wara li tircievi r-rapport minghand is-sotto-kumitat meta tkun ikkonkludiet l-investigazzjoni.

Kompla jixhed illi waqt laqgha tal-Kummissjoni li saret fil-15 ta` Marzu 2017, il-konsulent legali tal-Kummissjoni kien tal-fehma li l-Kummissjoni ghandha tahtar sotto-kumitat maghmul minn chairman, zewg membri u segretarju biex jigi nvestigat kull ilment billi jigbor l-informazzjoni u jressaq rapport lill-Kummissjoni minghajr ma jiehu l-ebda decizjoni. Il-fehma legali kienet trattata u diskussa fit-tul sakemm kien deciz li jsir is-sotto-kumitat kompost minn imhallef irtirat u awditur, flimkien ma` segretarju li kellu jkun impjegat tal-Ufficcju Elettorali.

Stqarr illi harget stqarrija ghall-istampa fis-16 ta` Marzu 2017.

Kompla stqarr illi l-komposizzjoni tas-sotto-kumitat tqajjmet fil-laqgha tal-21 ta` Marzu 2017 fejn saret mozzjoni biex l-awditur ikun Stefan Bonello ta` PWC li kienet inkarikata mill-Kummissjoni sabiex tifli u tivverifika rapporti finanzjarji meta dawn jigu sottomessi mill-partiti politici registrati

skont il-ligi. Bonello rrifjuta li jkun parti mis-sottokumitat ghax il-kuntratt li kellha PWC ma kienx jinkludi li seta` jinghata nkarigu biex issir investigazzjoni ta` dawk it-tipi ta` lmenti.

Xehed illi l-Kummissjoni hatret lill-Imhallef Emeritus Dr Geoffrey Valenzia u l-Awditur Mark Bugeja (Grant Thornton) ; dan tal-ahhar kien propost minn xi membri tal-Kummissjoni. Fl-24 ta` Marzu 2017, hargu t-*terms of reference.* Fil-laqgha tal-Kummissjoni tas-27 ta` Marzu 2017, huwa spjega lill-membri kif waqt laqgha li kellu mas-sotto-kumitat, l-Imhallef Valenzia kien wera artikolu li kiteb l-Av. Austin Bencini fit-Times of Malta ta` l-24 ta` Marzu 2017 fejn *inter alia* kien inghad illi l-Kummissjoni ma kellhiex is-setgha li tahtar bord investigattiv *sui generis*. Waqt dik il-laqgha, xi membri tal-Kummissjoni kien semmew li huma ma kellhomx ikunu : *a judge and jury*. Fil-kors tal-laqgha ssemmiet sentenza tal-Qorti Kostituzzjonali tat-3 ta` Mejju 2016 fil-kawza fl-ismijiet *Federation of Estate Agents vs Direttur Generali (Kompetizzjoni) et*.

Kompla jixhed illi sa minn qabel ma sar l-Att kienu tqanqlu dubji li l-ligi setghet tikser drittijiet fondamentali. Propju ghalhekk saret il-mistoqsija jekk il-Kummissjoni kenitx qeghda tikser il-Kostituzzjoni meta taghmel investigazzjoni hi u tiddeciedi hi dwar kazi ta` allegat ksur ta` l-Kap 544. Qal li fil-laqgha tal-Kummissjoni tal-5 ta` April 2017, xi membri ghamlu l-punt li ghalkemm il-ligi kien fiha hafna nuqqasijiet, il-Kummissjoni ma setghetx tidher li ma kienet qeghda taghmel xejn. Il-konsulent legali tal-Kummissjoni kien tal-fehma li ma kellhiex tkun il-Kummissjoni illi tghid jekk il-Kap 544 kienx imur kontra l-Kostituzzjoni, inkella le.

Qal illi ghaddiet mozzjoni fejn kien deciz illi l-Kummissjoni kellha timxi skont l-obbligi taghha stabbiliti fil-ligi u jinhatar is-sottokumitat. Wara din id-decizjoni, erba` membri ddikjaraw li kienu qed jirrinunzjaw milli jippartecipaw fl-investigazzjoni u/jew decizjoni ta` kazi li gew quddiem il-Kummissjoni. Dawn l-istess erba` membri kitbu lill-Eccellenza taghha l-President ta` Malta fis-6 ta` April 2017 sabiex tintervjeni fil-kwistjoni. Fl-ittra huma ddikjaraw li ma kinux qed jaccettaw illi jiehdu sehem fl-investigazzjoni sabiex ma jkunx hemm ir-riskju ta` ksur ta` jeddijiet fondamentali. Min-naha taghha l-President ta` Malta wiegbet fis-sens illi ma kellha l-ebda mansjoni fil-materja in kwistjoni.

Kompla jixhed li fis-7 ta` April 2017, huwa ltaqa` mal-Imhallef Valenzia u mal-Awditur Bugeja kif ukoll mas-Segretarju Savio Borg mill-Ufficcju Elettorali. Huma lkoll accettaw li jibdew jahdmu skont it-*terms of reference.* Iffirmaw it-*terms of reference* dakinhar stess. Is-sottokumitat iddikjara li kien ser jibda jisma` l-ewwel xhieda fis-17 ta` April 2017. Is-

sottokumitat beda jahdem fuq l-ewwel ilment li kien tressaq mill-Alternattiva Demokratika. Ix-xoghol fuq dak l-ilment tlesta u r-rapport wasal ghand il-Kummissjoni fit-22 ta` Mejju 2017.

Stqarr illi fid-19 ta` April 2017, il-Partit Nazzjonalista pprezenta r-rikors kostituzzjonali odjern. Ir-risposta tal-Kummissjoni Elettorali kienet prezentata fid-9 ta` Mejju 2017.

Kompla stqarr illi huwa qatt ma kien prezenti ghal-laqghat tas-sottokumitat peress li kien inhatar segretarju fejn ix-xoghol tieghu kien primarjament li jiehu noti tal-laqghat.

Qal illi fil-laqgha tal-Kummissjoni tat-12 ta` Lulju 2017, kien deciz li huwa jikteb bis-sahha tal-ligi [Art 37(4) tal-Kap 544] lil Silvio Debono u Arthur Gauci ta` Db Group biex jissottomettu informazzjoni u dokumenti mehtiega. L-ittra tieghu kienet datata 17 ta` Lulju 2017. L-istess intalab mis-sottokumitat. Debono u Gauci wiegbu bl-avukat taghhom Av. Stefano Filletti fejn ghazlu li ma jilqghux l-istedina li saritilhom.

George Saliba – Segretarju tal-Kummissjoni Elettorali mill-1 ta` Lulju 2015 – xehed illi l-Kummissjoni sabet ruhha fil-posizzjoni antipatika li tkun affidata bil-kontroll u bl-awditjar tal-finanzjament tal-partiti politici. Ghalhekk wara process ta` *expression of interest* kienet inkarikata f`Novembru 2015 id-ditta ta` awdituri PricewaterhouseCoopers (**PWC**).

Stqarr illi l-Kummissjoni bdiet tittratta l-ilmenti li rceviet dwar ksur tal-Kap 544 f`laqgha straordinarja li saret fl-10 ta` Marzu 2017. Irceviet bil-miktub (a) fil-21 ta` Frar 2017 ilment minn Alternattiva Demokratika dwar allegat uzu hazin li ghamel il-Partit Laburista mill-Palazz tal-Girgenti ; (b) fl-10 ta` Marzu 2017 ilment mill-Partit Laburista illi l-Partit Nazzjonalista allegatament kien ircieva donazzjonijiet kontra l-ligi minghand Db Group ; u (c) fl-10 ta` Marzu 2017 ilment mill-Partit Nazzjonalista fejn kien allegat illi l-Partit Laburista ma kienx irregistra bhala partit politiku, li ma kienx ipprezenta dettalji dwar donazzjonijiet, u li kellu persuni jahdmu mieghu li huma mhallsin mit-taxxi pubblici.

Kompla jghid illi fil-kors tal-laqgha, il-konsulent legali tal-Kummissjoni issuggerixxa li jinhatar sotto-kumitat biex jaghmel rapport dwar kull ilment wara li jkun sema` x-xhieda kollha. Esprima ruhu fis-sens illi l-Kap 544 ma kienx car u kien fih nuqqasijiet fosthom li l-Kummissjoni ma setghetx titlob stqarrijiet guramentati, ma kellhiex il-mezzi kif tordna

sabiex persuna tidher quddiemha, ma kellhiex rimedji, ma kenitx cara dwar fuq min setghu jigu mposti multi.

Saret laqgha ohra fil-15 ta` Marzu 2017 u l-konsulent legali tal-Kummissjoni ssuggerixxa li l-Kummissjoni tahtar sotto-kumitat kompost minn chairman, zewg membri u segretarju biex jigi nvestigat kull ilment billi tingabar informazzjoni u jsir rapport lill-Kummissjoni minghajr ma s-sotto-kumitat jiehu decizjoni. Il-membri tal-Kummissjoni ddiskutew fit-tul dan is-suggeriment u fl-ahhar hadu d-decizjoni li s-sotto-kumitat ikun kompost minn Imhallef Irtirat u Awditur flimkien ma` Segretarju li jkun impjegat tal-Ufficcju Elettorali. Harget stqarrija ghall-istampa fis-16 ta` Marzu 2017.

Kompla jixhed illi l-komposizzjoni tas-sottokumitat tqajjmet fil-laqgha tal-21 ta` Marzu 2017 fejn saret mozzjoni sabiex l-Awditur ikun Stefan Bonello ta` PWC li kienet giet ingaggjata mill-Kummissjoni sabiex taghmel verifika tar-rapporti finanzjarji meta dawn jigu sottomessi mill-partiti politici li jkun registrati skont il-ligi. Bonello ma accettax li jkun parti mis-sottokumitat billi l-kuntratt li kellha PWC ma kienx jinkludi li seta` jinghata l-inkarigu illi jinvestiga dawk it-tip ta` lmenti. Il-mozzjoni ma ghaddietx. In segwitu l-Kummissjoni hatret lill-Imhallef Emeritus Dr Geoffrey Valenzia u l-Awditur Mark Bugeja (Grant Thornton).

Xehed li fl-24 ta` Marzu 2017, hargu t-*terms of reference* u fil-laqgha tal-Kummissjoni tas-27 ta` Marzu 2017, il-Kummissarju Ewlieni fisser lill-membri kif waqt inkontru li kellu dakinhar stess li l-Imhallef Valenzia u l-Awditur Bugeja ffirmaw it-*terms of reference* l-Irrefera ghal artikolu li kiteb Av. Austin Bencini fit-Times of Malta ta` l-24 ta` Marzu 2017 fejn fost affarijiet ohra kiteb li l-Kummissjoni ma kellhiex is-setgha li tahtar bord investigattiv *sui generis*. Waqt il-laqgha tal-kummissjoni, xi membri kienu tal-fehma li ma kellhom ikunu *judge and jury*. Fil-kors tal-laqgha ssemmiet id-decizjoni li tat il-Qorti Kostituzzjonali fit-3 ta` Mejju 2016 fil-kawza *Federation of Estate Agents vs Direttur Generali (Kompetizzjoni) et* fejn kien inghad illi min investiga kien kiser il-jedd ghal smigh xieraq ghax kien l-istess korp li ggudika.

Stqarr illi sa minn qabel sar il-Kap 544 kienu tqanqlu dubji li l-ligi setghet tikser drittijiet fondamentali. Ghalhekk saret il-mistoqsija ta` jekk il-Kummissjoni tkunx qeghda tikser il-Kostituzzjoni meta taghmel investigazzjoni u tiddeciedi hi dwar kazi ta` allegat ksur tal-Kap 544. Fil-laqgha tal-Kummissjoni tal-5 ta` April 2017, xi membri ghamlu l-punt illi ghalkemm il-ligi kien fiha hafna nuqqasijiet, il-Kummissjoni ma setghetx tidher li mhi qed taghmel xejn dwar il-ilmenti li saru u li kienu serji min-natura taghhom. Il-konsulent legali tal-Kummissjoni kien tal-fehma li ma

kienx jispetta lill-Kummissjoni li tghid jekk il-Kap 544 kienx imur kontra l-Kostituzzjoni nkella le. Ghalhekk ghaddiet mozzjoni fejn kien deciz li l-Kummissjoni kellha tkompli bl-osservanza tal-obbligi li tatha l-ligi u kkonfermat il-hatra tas-sottokumitat. Wara li ghaddiet il-mozzjoni, erba` membri ghamlu dikjarazzjoni fis-sens illi kienu qed jirrinunzjaw milli jippartecipaw fl-investigazzjoni u/jew decizjoni tal-kazi li kellha quddiemha l-Kummissjoni.

Kompla jixhed li in segwitu, il-Kummissarju Ewlieni Joseph Church iltaqa` mal-Imhallef Valenzia u mal-Awditur Bugeja kif ukoll mas-Segretarju Savio Borg u l-membri tas-sottokumitat bdew jahdmu skont it-*terms of reference*. Is-sottokumitat beda jisma` l-ewwel xhieda fis-17 ta` April 2017 u beda jahdem fuq l-ilment ta` Alternattiva Demokratika. Is-sottokumitat lesta x-xoghol tieghu dwar dak l-ilment.

Xehed illi fir-risposta li pprezentat ghar-rikors kostituzzjonali odjern, il-Kummissjoni kkonfermat li meta inkarikat lis-sottokumitat, dan ma nghata l-ebda delega ta` responsabblita`. Kellu jigbor informazzjoni halli imbaghad b`mod imparzjali u indipendenti l-Kummissjoni tiddeciedi ghandhiex issejjah partit politiku biex jirrispondi. Il-Kummissjoni qdiet id-dmirijietv taghha fil-parametri stabbiliti fil-ligi.

Stqarr illi fl-1 ta` Mejju 2017 kienet proklamata l-elezzjoni generali. Ghalkemm s-sottokumitat baqa` jahdem, il-Kummissjoni kkoncentrat il-hidma taghha fuq l-elezzjoni.

Qal illi huwa qatt ma kien prezenti ghal xi laqgha tas-sottokumitat. Kien jaf bil-laqgha ghaliex waqt laqgha tal-Kummissjoni tat-12 ta` Lulju 2017, is-Segretarju Savio Borg kien mistieden juri l-file kollu lill-Kummissjonarji u ta spjega verbali. Fit-3 ta` Awissu 2017 kienet ipprezentata lista tal-laqghat li kienu jirrigwardaw il-kaz tad-Db Group. Fl-ahhar seduta tas-sottokumitat li saret fit-28 ta` Gunju 2017, sar verbal li kien pprezentat lill-Kummissjoni.

<u>Av. Prof. Kevin Aquilina</u> - Dekan tal-Fakolta` tal-Ligi fl-Universita` ta` Malta – xehed illi permezz ta` zewg artikoli li kienu ppubblikati fit-Times of Malta fix-xhur ta` April u Lulju 2017, huwa esprima l-fehmiet tieghu dwar Kap 544. Kien solitu ghalih illi meta josserva dak li jkun difettuz f`ligi huwa jikteb fil-gurnali biex jattira l-attenzjoni ta` l-awtoritajiet koncernati. Kien hemm artikolu minnhom fejn ittratta l-kaz ta` donazzjoni li kienet saret mid-Db Group. Jekk wiehed iqis il-gurisprudenza, inkluz dik tal-ECHR, isib li hemm problema dwar ir-regim legali tar-reati amministrattivi. F`artikolu

minnhom huwa stqarr illi : "*The Electoral Commission does not qualify as an independent and impartial tribunal in Strasbourg case law*." Sabiex jithares l-Art 6 tal-Konvenzjoni, irid ikun hemm *an independent and an impartial tribunal established by law*.

Av. Tonio Borg xehed illi huwa ghalliem fil-Fakolta` tal-Ligi l-Universita` ta` Malta. Ikkonferma li huwa kiteb artiklu li deher fil-harga tat-28 ta` Marzu 2017 tal-gurnal The Times of Malta fejn esprima l-fehma tieghu dwar Kap 544. It-thassib tieghu kien dwar il-fatt illi l-Kummissjoni Elettorali nghatat setghat li ma jirrizultawx mill-Kostituzzjoni ta` Malta.

Av. Raymond Zammit – membru tal-Kummissjoni Elettorali sa mill-2006 – xehed illi huwa kien inhatar mill-President ta` Malta fuq parir tal-Prim Ministru wara konsultazzjoni mal-Kap ta` l-Oppozizzjoni. Qal illi wara l-1987 kienet bdiet prassi fejn il-Prim Ministru beda jitlob lill-Kap ta` l-Oppozizzjoni sabiex jipproponi l-ismijiet ta` erba` persuni sabiex b`hekk l-membri tal-Kummissjoni bdew jintghazlu in kwantu ghal erbgha mill-Gvern, erbgha mill-Opposizzjoni, waqt li c-Chairman jinghazel bi qbil bejn it-tnejn, ghalkemm fil-kaz tac-Chairman prezenti ma kienx intlahaq qbil bejn iz-zewg nahat.

Huwa cahad li fil-Kummissjoni huwa kien jirrapprezenta partit. Huwa ghandu fiducja fil-membri kollha u lkoll jahdmu tajjeb bhal tim.

Spjega li meta l-Kap 544 beda jigi diskuss maghhom, huwa kien immedjatament ghamilha cara li li huwa zball li l-ligi tinghata lill-Kummissjoni biex thaddimha. Qal li meta nholqot il-Kummissjoni, ma kienx hemm l-idea li l-Kummissjoni kienet se ssir gudikant tal-partiti politici fejn jidhol il-finanzjament taghhom. Qal li l-problema kienet giet ukoll diskussa internament flimkien ma` Prof Ian Refalo li wkoll wera certa rizervi. Dan kien sahaq fuq li ma kienx felici li min ikun qieghed jaghmel l-investigazzjoni, jiddeciedi wkoll hu. Qal li ma kienx tajjeb li l-Kummissjoni taghmel l-investigazzjoni biex tara hemmx ksur tal-Kap 544, u mbaghad wara, tiddeciedi hi u tapplika l-piena..

Stqarr illi kien hemm partijiet tal-ligi li ghandhom sanzjoni ta` natura penali u ghalhekk kellhom jigu osservati l-principji tas-smigh xieraq. Il-Kummissjoni qaghdet lura milli tippartecipa fid-dibattitu politiku peress illi fil-ligi kellha wkoll ir-rwol ta` gudikant. Qal li ma jistax ikun li l-Kummissjoni tahdem biex taghmel elezzjoni kemm jista` jkun gusta, u fl-istess nifs tkun hi li tinvestiga l-partiti politici sabiex tara jekk kisrux il-ligi.

Kien ghalhekk illi l-Kummissjoni ppruvat issib soluzzjoni billi holqot sotto-kumitat biex jinvestiga hu taht il-kontroll taghha.

Spjega li s-sotto-kumitat kellu biss il-funzjoni li jigbor il-provi. Kien hemm qbil unanimu li jinhatar l-Imhallef Emeritus Geoffrey Valenzia. Dwar l-ghazla ta` l-Awditur, ma kienx hemm unanimita`. Stenna li kellu jkun unanimita`. Kien ghalhekk illi hu, Dr Victor Scerri, Dr Joseph Zammit Maempel u Mario Callus kitbu lill-President ta` Malta fejn spjegaw li huma kienu qed jaghzlu li ma jhaddmux il-ligi ladarba kien hemm il-biza` ta` ksur ta` jeddijiet drittijiet fundamentali.

Kompla jghid li s-sotto-kumitat baqa` jigbor il-provi minkejja li saret din il-kawza.

Stqarr illi l-ligi hija tajba izda l-Kummissjoni Elettorali ma kellhiex tkun l-organu li tiddeciedi ghax hija qatt ma kienet mahluqa biex tiddeciedi kwistjonijiet prettament politici bejn il-partiti.

Sostna li wara li jkunu ngabru l-provi, huwa ma kienx ser jippartecipa fid-decizjoni li kienet ser tittiehed in segwitu.

Spjega li dik kienet l-ewwel darba li kienet qeghda tithaddem l-ligi. Bhala fatt kien hemm erba` membri li ma kinux lesti li jippartecipaw fid-diskussjoni ta` x`se jsir wara li jkun sar il-gbir tal-provi u cioe` fid-decizjoni ta` jekk il-partit politiku koncernat ikunx kiser il-Kap 544.

Fil-**<u>kontroezami</u>**, huwa kkonferma li s-sotto-kumitat kellu biss jigbor il-provi. Ikkonferma li l-Kummissjoni ma ddecidiet xejn hlief li hatret is-sotto kumitat biex jigbor il-provi. Spjega li fir-rigward ta` lment minnhom, u cioe` il-kaz tal-Palazz tal-Girgenti, il-provi inghalqu u kien ha jitressaq quddiemhom ghal decizjoni tant li ntbaghat abbozz ta` kif kellha tkun id-decizjoni mis-segretarju tal-Kummissjoni. Qal li hu u tlieta ohra kienu diga` ddikjaraw li ma kienux sejrin jippartecipaw ghaliex fil-fehma taghhom il-materja kienet tmur kontra l-Kostituzzjoni. Lanqas ma qablu mad-decizjoni li kienet ser tittiehed. Id-decizjoni baqghet ma ttehditx.

Ikkonferma li fejn jidhlu prattici korrotti waqt elezzjoni hemm il-piena karcerarja. Qal li ma jidhirlux li fejn jidhlu prattici serji ta` finanzjament hemm piena ta` habs, ghalkemm il-Konvenzjoni taghti l-istess drittijiet u l-istess kawteli tal-ligi kriminali.

Sostna li kull darba li jkun hemm bzonn tittiehed decizjoni mill-Kummissjoni li jkollha xejra politika, ir-rizultat tal-vot ikun ta` hamsa kontra erbgha.

Av. Victor Scerri - membru tal-Kummissjoni Elettorali sa minn Awissu 2015 – xehed illi l-hatra tieghu hija ghal tliet snin.

Stqarr illi huwa kien imhasseb dwar li l-Kap 544 ser jikser il-Kostituzzjoni u l-Konvenzjoni, wara li qies pariri legali u qara artikoli fil-gurnali.

Meta hu u tliet membri ohra tal-Kummissjoni kitbu lill-President ta` Malta, il-ligi kienet dahlet fis-sehh.

Spjega li s-sotto-kumitat inghata *terms of reference.* Fil-fatt kellu jibghat ghal persuni li kontrihom sar l-ilment u jisimghu x-xhieda. Ma kellhomx jaghtu l-gurament. Is-sotto-kumitat imbaghad kellu jibghat ix-xiehda li tkun ingabret lill-Kummissjoni.

Qal li ma jafx x`kien ser jigri wara ghalkemm il-Kummissjoni kienet sejra taghti decizjoni dwar htija.

Stqarr illi l-Kummissjoni hija komposta minn disa` membri li m`ghandhomx *security of tenure.*

Skont il-ligi, il-Kummissjoni ghandha l-obbligu li tinvestiga.

Av. Joseph Zammit Maempel – ukoll membru tal-Kummissjoni Elettorali – xehed illi l-ittra lill-President ta` Malta saret fl-isfond ta` s-sentenza li kienet nghatat fir-rigward ta` l-Malta Communications Authority.

Spjega li l-ligi kif kienet, kienet ser timponi fuqhom li jkunu zewg partijiet fi process. Is-sotto-kumitat kellu l-mansjoni li jigbor il-provi.

Qal li l-Kummissjoni rceviet zewg ilmenti, wahda minn Alternattiva Demokratika u ohra mill-Partit Laburista.

Ikkonferma li fi Frar 2017, il-Partit Laburista kien ghadu mhux registrat bhala partit politiku. L-ilment xorta wahda kien riferut lis-sotto kumitat. Ir-registrazzjoni tal-Partit Laburista saret wara.

Skont il-ligi, il-Kummissjoni kellha l-poter li timponi multi amministrattivi.

Fil-**kontroezami**, stqarr illi in vista ta` din il-kawza, il-Kummissjoni waqfet milli tipprocedi fuq il-provi li gaba ris-sotto-kumitat.

Paul Sammut - membru tal-Kummissjoni Elettorali – xehed illi meta dahal l-ilment minn Alternattiva Demokratika dwar l-uzu hazin tal-Palazz tal-Girgenti mill-Prim Ministru, il-Kummissjoni kienet ser tirrispondi lil Alternattiva Demokratika minghajr ma ssir investigazzjoni. Imbaghad, kienu dahlu lmenti mill-Partit Laburista dwar id-Db Group u ittra ohra mill-Partit Nazzjonalista. Qal li kien hemm min insista li ssir investigazzjoni. Intlahaq kompromess fis-sens li jigi mahtur sotto-kumitat b`kompitu ta` *fact finding* fis-sens li kellu jigbor l-informazzjoni, ighaddiha lill-Kummissjoni u din imbaghad tiddeciedi.

Kompla jghid illi kien hemm xi membri tal-Kummissjoni ghax sostnew li l-procedura kienet tmur kontra l-Kostituzzjoni. Min-naha tieghu huwa kien tal-fehma li l-ligi kellha tigi applikata biex imbaghad jigi skopert jekk jiex tajba jew le. Sal-lum ma ttiehdet l-ebda decizjoni ghalkemm is-sotto-kumitat lesta il-gbir tal-provi dwar l-ilment tal-Girgenti. Il-hatra tas-sotto-kumitat saret Marzu 2017.

Fil-**kontroezami**, ikkonferma li l-Partit Laburista ma kienx registrat bhala partit politiku fi Frar 2017. Spjega li l-Kummissjoni Elettorali hadet konjizzjoni ta` lment li sar kontra partit li ma kienx ghadu registrat skont il-Kap 544. Il-Partit Laburista kien talab li jigi registrat qabel dahal l-ilment ta` Alternattiva Demokratika.

Stqarr illi x-xiehda li gaba is-sotto-kumitat marret ghand kull membru tal-Kummissjoni, izda ma ttiehditx decizjoni ghax lahqet l-elezzjoni.

Sostna li jekk ikun hemm kwistjoni amministrattiva, din tigi deciza mill-Kummissjoni izda meta tkun kwistjoni kriminali, huwa il-kaz imur ghand il-Kummissarju tal-Pulizija.

Ikkonferma li huwa kien inhatar membru tal-Kummissjoni ghal zmien it-tliet snin. Il-hatra tista` ma tkunx imgedda.

III. L–ewwel (1) eccezzjoni preliminari tal-Avukat Generali

1. L-eccezzjoni

L-Avukat Generali eccepixxa n-nuqqas ta` applikabbilita` tal-Art 39 tal-Kostituzzjoni ta` Malta (‘**il-Kostituzzjoni’**) u tal-Art 6 tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u Libertajiet Fondamentali (‘**il-Konvenzjoni’**) peress illi d-dritt ta` smigh xieraq ighodd biss ghal organi li jiddeterminaw drittijiet jew obbligi civili jew akkuzi kriminali. Il-Kummissjoni m`ghandhiex dawk il-funzjonijiet.

Fil-kawza tal-lum, il-Kap 544 qed jigi interpretat mir-rikorrenti bhala li jipprovdi ghad-determinazzjoni ta` akkuzi kriminali u ghall-imposizzjoni ta` penali kriminali.

Min-naha tieghu, l-Avukat Generali jikkontesta din l-interpretazzjoni billi jikkontendi li l-Kap 544 fih biss sanzjonijiet li huma mposti fl-isfera politika li allura jaqghu barra mill-applikazzjoni tal-Art 39 tal-Kostituzzjoni u tal-Art 6 tal-Konvenzjoni.

Min-naha taghha, il-Kummissjoni tikkontendi li s-sanzjonar li l-Kap 544 affidalha mhuwiex ta` natura kriminali peress li l-legislatur ma riedx jghabbi lil min jikser il-ligi b`tebgha kriminali anzi ried li l-ligi tkun wahda funzjonali sabiex tilhaq tassew l-ghan ewlieni li tirregola l-qasam.

2. Dritt

L-Art 6 tal-Konvenzjoni jghid :-

> *“Fid-decizjoni tad-drittijiet civili u ta` l-obbligi tieghu jew ta` xi akkuza kriminali kontra tieghu,*

kulhadd huwa intitolat ghal smiegh imparzjali u pubbliku fi zmien ragonevoli minn tribunal indipendenti u mparzjali mwaqqaf b`ligi."

L-Art 39(1) tal-Kostituzzjoni jaqra :-

"Kull meta xi hadd ikun akkuzat b`reat kriminali huwa ghandu … jigi moghti smigh xieraq gheluq zmien ragonevoli minn qorti indipendenti u mparzjali mwaqqfa b`ligi."

Imbaghad l-**Art 39(2) tal-Kostituzzjoni** jipprovdi illi :

"Kull qorti jew awtorita` ohra gudikanti mwaqqfa b`ligi ghad-decizjoni dwar l-ezistenza jew l-estensjoni ta` drittijiet jew obbligi civili ghandha tkun indipendenti u imparzjali."

Kemm l-Art 6 tal-Konvenzjoni kif ukoll l-Art 39(2) tal-Kostituzzjoni jispecifikaw illi d-drittijiet msemmija hemm jispettaw lil dik il-persuna li fil-konfront taghha tkun ser tittiehed decizjoni dwar id-drittijiet civili u obbligi taghha jew, fil-kaz biss ta` l-Art 6 tal-Konvenzjoni, dwar akkuza kriminali li tkun ingabet kontra taghha. Fl-Art 39(1) tal-Kostituzzjoni, jinghad illi s-smigh irid isir minn qorti u allura korp kostitwit bis-setgha li jorbot lill-partijiet bid-decizjoni li jaghti.

3. Drittijiet civili u obbligi tal-persuna ghall-fini ta` l-Art 6 tal-Konvenzjoni

Hija dibattuta ferm l-kwistjoni ta` x`jikkostitwixxu *civil rights and obligations* ghall-fini tal-Art 6 tal-Konvenzjoni.

Fil-kitba tieghu : **Applicability of Article 6 ECHR** : **Martin Kuijer** – Professur ta` Human Rights Law fil-Vrije Universiteit ta` Amsterdam – jittratta d-diffikultajiet inerenti fid-definizzjoni ta` *civil rights and obligations.*

Ighid hekk :-

The interpretation of "civil rights and obligations" has led to a lively debate. It has been unclear from the very beginning what is exactly meant by this phrase. Compared to provisions dealing with a fair trial in other international human rights documents, Article 6 ECHR is the only provision with this limitation clause ….

*Van Dijk has in my view cogently argued that the drafting history of the European Convention (in the light of the drafting history of the ICCPR {International Covenant on Civil and Political Rights}) would seem to indicate that "procedures concerning the determination of civil rights and obligations together with criminal procedures were considered to cover all adjudicative procedures and that consequently, `civil` was used in the sense of `non-criminal`". (P. van Dijk, "**The interpretation of `civil rights and obligations` by the European Court of Human Rights - one more step to take",** in: F. Matscher & H. Petzold (eds.), **Protecting Human Rights: The European Dimension – Essays in honour of G. Wiarda, Köln: Carl Heymanns Verlag**, 1988, pp. 131-143. See also: **Th. Buergenthal & W. Kewenig, "Zum Begriff der Civil Rights in Artikel 6 Absatz 1 der Europäischen Menschenrechtskonvention",** in: Archiv des Völkerrechts 1966/67, pp. 404-406 and K.J. Partsch, **Die Rechte und Freiheiten der europäischen Menschenrechtskonvention**, Berlin, 1966, pp. 143-145.)*

*Likewise, Commission members Frowein and Melchior argued in their dissenting opinion in the Benthem case that "all those rights which are individual rights under the national legal system and fall into the sphere of general individual freedom, be it professional or any other legally permitted activity, must be seen as civil rights". (EComHR, 8 October 1983, **Benthem - Netherlands** (Series A- 97), Dissenting opinion, §10.)*

Unfortunately, however, such a broad interpretation as argued by Van Dijk, Frowein and Melchior has not been the standpoint of the Court. Equally

unfortunate is the fact that the Court has never given an abstract definition of the phrase "civil rights and obligations". This is disappointing from the point of view of legal certainty and clarity and has led to a disorderly body of case-law based on ad hoc decisions. Let me attempt to give an overview of the current status quo.

Article 6 ECHR will only be applicable if (a) there is a dispute (`contestation`) of a serious and legal nature between two (legal) persons which are in some relation to the right ; (b) the disputed right has - at least on arguable grounds - been recognised under national law; (c) the outcome of the national proceedings is directly decisive for these rights and obligations ; and (d) these rights are `civil` in the autonomous sense of the Convention. If national law classifies a disputed right as `civil` there is usually no reason for the Court to reach a different conclusion. Problems only arise if national law classifies the disputed right as `non-civil`, for example administrative law. The Court therefore emphasised the autonomous character in the König case. Whether or not a right is to be regarded as civil within the meaning of the Convention must be determined by reference to the substantive content and effects of the right - and not its legal classification under domestic law (ECHR, 28 June 1978, ***König - Germany*** *(Series A-27), §§88-89). Already in the* ***Ringeisen*** *judgment the Court had clarified that for Article 6 to be applicable it is not necessary that both parties to the proceedings should be private persons (ECHR, 16 July 1971,* ***Ringeisen - Austria*** *(Series A-13), §94). And in the before mentioned* ***König*** *judgment, the Court elaborated that Article 6 does not only cover private-law disputes in the traditional sense, that is disputes between individuals or between an individual and the State to the extent that the latter had been acting as a private person, subject to private law. If the case concerns a dispute between an individual and a public authority, whether the latter has acted as a private person or in its sovereign capacity is not conclusive. The result of this conclusion was that parts of public law could now fall under the scope of application of Article 6 ECHR. In subsequent case-law the Court would look*

at the substance of the right and would balance the public law features against the private law features (such as the right being "personal and economic"). If private law features would be predominant, Article 6 would apply (See, for example, ECHR, 29 May 1986, ***Feldbrugge - Netherlands*** *(Series A-99) and ECHR, 29 May 1986,* ***Deumeland - Germany*** *(Series A-100). The Court continued to give a dynamic interpretation and the phrase continued to expand. In the Salesi case the Court stated that "today the general rule is that Article 6 §1 does apply in the field of social insurance", including welfare assistance even though public law features seemed to be predominant (i.e. the benefits were entirely funded by the State and an entitlement to the benefit existed independently of a private employment contract) (ECHR, 26 February 1993,* ***Salesi - Italy*** *(Series A-257-E), §19). As a general rule one could say that virtually any dispute (not taking into account the exceptions mentioned below) affecting one`s income or property falls within the scope of Article 6 §1 (The Court speaks of "propriertary character" and "commercial activities" in ECHR, 23 October 1985,* ***Benthem - Netherlands*** *(Series A-97), §36). It is as of yet unclear whether the Court in a more recent judgment departs from its standing case-law and widens the notion of `civil rights and obligations`. In a judgment of November 2002 the Court stated that the civil limb of Article 6 ECHR is applicable, "seeing that it was designed to seek protection of individual rights from the interference by the executive authorities" (ECHR, 7 November 2002,* ***Veeber - Estonia*** *(No. 1) (appl. no. 37571/97), §69).*

Fil-ktieb : **Protecting the right to a fair trial under the European Convention on Human Rights (**Council of Europe - Human Rights Handbook - 2012) : **Dovydas Vitkauskas u Grigoriy Dikov** : ighidu hekk dwar x`jammonta ghal *civil rights and obligations :*

> *The notion of civil rights and obligations is autonomous from the domestic-law definition (Ringeisen).*

*Article 6 applies irrespective of the status of the parties, and ofthe character of the legislation governing the determination of the dispute; what matters is the character of the right at issue, and whether the outcome of the proceedings will have a direct impact on the private-law rights and obligations (**Baraona v. Portugal**, §§38-44).*

*The economic nature of the right is an important but not a decisive criterion in establishing the applicability of Article 6. The action itself must be at least pecuniary in nature and be founded on an alleged infringement of rights which are likewise pecuniary rights (**Procola v. Luxembourg**, §§37-40). The existence of a financial claim among the grievances of the applicant does not necessarily make the dispute "civil" (**Panjeheighalehei v. Denmark**, dec.).*

*The private-law elements must be predominant over the public-law elements for an action to be qualified as "civil" (**Deumeland v. Germany**, §§59-74). At the same time, there are no elaborate criteria for a universal definition of a "civil" dispute, in contrast to the criteria for defining a "criminal offence"(Engel)."*

Gwidati mill-gurisprudenza tal-ECHR, **Vitkauskas u Dikov** jaghmlu lista ta` x`jammontaw ghal *civil disputes* :-

i) Disputes between private parties, such as actions in tort, contract and family law.

*ii) Involving right to earn a living by engaging in a liberal profession – e.g. practising as a medic (**Koenig v. Germany**), accountant (**Van Marle**), or advocate (**H. v. Belgium**).*

*iii) Right to engage in an economic activity restricted by an administrative regulation or withdrawal of a licence – e.g to operate a taxi (**Pudas v. Sweden**) or gas-supply installation (**Benthem**), serve liquor (**Tre Traktörer AB v. Sweden**), or work a gravel pit (**Fredin v. Sweden**).*

*iv) Monetary claim at the centre of the dispute, such as the annulment of an order for damages for improper termination of a construction tender (**Stran Greek Refineries and Stratis Andreadis v. Greece**).*

*v) Actions concerning pension entitlements, social, health and other benefits, regardless of whether the rights at issue are derived from contractual relations, previous personal contributions, or the public-law provisions on social solidarity – so long as the assessment of an amount of money is the object of the dispute (**Salesi**).*

*vi) Employment disputes by public officials regarding their salary, pensions or related compensations – as long as the object of the action is not the dismissal itself or the refusal of access to the civil service, and the domestic law provides for access to a court in such matters (**Vilho Eskelinen**).*

*vii) Employment disputes, including those concerning dismissal or salaries (**Kabkov v. Russia**).*

*viii) Action in tort for alleged mismanagement of public funds brought by the public authorities against a former mayor (**Richard-Dubarry v. France**).*

*ix) Action in tort of negligence directed against the police in relation to the function of crime prevention, where brought by a direct victim of the alleged negligence (**Osman**).*

*x) Claim for access to information held by the public authorities, where such disclosure could influence significantly a person`s private career prospects (**Loiseau v. France**).*

*xi) Administrative decisions directly affecting property rights, including refusal of approval of a land-sale contract (**Ringeisen**), orders affecting applicants` capacity to administer their assets taken in the mental health (**Winterwerp v. the Netherlands**) and criminal (**Baraona**) spheres, proceedings relating to the right to occupy one`s property (**Gillow v. the United Kingdom**), agricultural land consolidation (**Erkner and Hofauer v. Austria**), expropriation of land (**Sporrong and Lönnroth v. Sweden**), building permits (**Mats Jacobsson v. Sweden**), permission to retain assets acquired at auction (**Håkansson and Sturesson v. Sweden**), and various types of land compensation (**Lithgow and others v. the United Kingdom**) or restitution (**Jasiūnienė v. Lithuania**) proceedings.*

*xii) Claim for compensation arising from unlawful detention (**Georgiadis**).*

*xiii) Claim for compensation for alleged torture, including where committed by private persons or abroad (**Al-Adsani v. the United Kingdom**).*

*xiv) Complaint about conditions of detention (**Ganci v. Italy**).*

*xv) Claim for release from a psychiatric ward (**Aerts v. Belgium**).*

*xvi) Decision by the child-care authorities restricting parental access (**Olsson v. Sweden**)*

*xvii) Claims of victims of alleged crime lodged in the context of criminal proceedings (**Saoud v. France**); rights of a widow in criminal proceedings against her (deceased) defendant (**Grădinar v. Moldova**), disciplinary proceedings in respect of a prisoner where they resulted in a restriction of the applicant`s right to receive family visits in prison (**Gülmez v. Turkey**), or the right to a temporary leave for social reintegration (**Boulois v. Luxembourg** pending before the Grand Chamber at the time of writing).*

Vitkauskas u Dikov jaghmlu wkoll elenku ta` "*disputes found not to be 'civil'* skont il-gurisprudenza tal-ECHR :-

*i) Investigation by government inspectors into business takeover, despite tenuous consequences of their report on an applicant`s reputation (**Fayed v. the United Kingdom**).*

*ii) Determination of the right to occupy a political office, such as sitting in the legislature (**Ždanoka v. Latvia**, dec.), becoming president (**Paksas v. Lithuania** [GC]) or mayor (**Cherepkov v. Russia**).*

*iii) Proceedings for asylum, deportation and extradition (**Slivenko v. Latvia**, dec. ; **Monedero Angora v. Spain**).*

*iv) Proceedings concerning tax assessment (**Lasmane v. Latvia**, dec.), unless surcharges and penalties are involved, in which case Article 6 may apply under its "criminal" head (**Janosevic v. Sweden**); disputes concerning the lawfulness of search and seizure operations carried out by tax authorities are also civil (**Ravon and others v. France**).*

*v) Procedural challenges for withdrawal of a judge and composition of the court by a plaintiff in criminal proceedings (**Schreiber and Boetsch v. France,** dec.); there is thus no separate right of access to a court to complain about procedural decisions, but a single right of access aimed at obtaining determination of an ancillary civil or criminal case.*

*vi) Actions alleging general incompetence of the authorities or improper execution of their official duties, as long as there is no sufficient reasonable link between the alleged actions or inactivity of the authorities on the one hand, and the applicant`s private-law rights and obligations on the other (mutatis mutandis, **Schreiber and Boetsch,** dec.)*

*viii)i Disciplinary proceedings concerning dismissal of a military officer for belonging to an Islamic fundamentalist group, without a possibility of obtaining judicial review of the decisions of the military command (**Sukût v. Turkey**, dec.).*

*viii) Proceedings within Evangelical Lutheran Church concerning transfer of priest to another parish, not amenable to judicial review under Finnish law (**Ahtinen v. Finland**).*

*ix) Proceedings concerning internal administrative decisions of an international organisation, namely the European Patent Office (**Rambus Inc. v. Germany**, dec.).*

*x) Action in damages by asylum seeker for refusal to grant asylum (**Panjeheighalehei,** dec.).*

*Xi Proceedings concerning rectification of personal data in the Schengen database (**Dalea v. France**, dec.).*

Anke **Martin Kuijer** (op. cit.) jaghti lista ta` dawk il-ligijiet li ma jaqghux fl-ambitu ta` l-applikazzjoni ta` s-*civil limb* ta` l-Art 6 tal-Konvenzjoni cioe` (i) *taxation,* (ii) *recruitment, employment and retirement of public servants* (iii) *residence permits and expulsion of aliens* u (iv) *political rights.*

In partikolari, dwar *political rights* **Martin Kuijer** ighid :

> *The Court also held that electoral disputes do not fall within the scope of Article 6 ECHR. The right to stand for election is a political one and not a `civil` one. The mere fact that proceedings also raise an `economic issue` does not mean that they have become `civil` in the sense of the Convention. (ECHR, 21 October 1997, **Pierre-Bloch – France** (Reports 1997, 2223), §51).*
>
> *In the **Refah Partisi** case, the Court had to rule on the applicability of Article 6 ECHR in a Turkish case concerning proceedings before the constitutional court on the prohibition of a political party. The Court ruled that complaints about the fairness of national proceedings concerning alleged restrictions on the exercise of political rights will be declared incompatible ratione materiae with the Convention. (ECHR (dec.), 3 October 2000, **Refah***

> ***Partisi a.o. - Turkey*** *(appl. no. 41340/98): "En effet, la procédure devant la Cour constitutionnelle portrait sur un litige relatif au droit du R.P. de poursuivre, en tant que parti politique, ses activités politiques. Il s`agissait donc, par excellence, d`un droit de nature politique qui, comme tel, ne relève pas de la garantie de l`article 6 §1 de la Convention" [the decision on admissibility is only available in French]. See also: ECHR, 9 April 2002,* ***Yazar, Karataş, Aksoy et le Parti du Travail du Peuple (HEP) - Turkey*** *(appl. no. 22723/93 a.o.), §66.)"*

Similment l-ECHR fil-**Guide on Article 6 of the European Convention on Human Rights- Right to a fair trial (civil limb)** – hekk kif aggornat sal-31 ta` Dicembru 2017 – qalet hekk :

> *64. Political rights such as the right to stand for election and retain one`s seat (electoral dispute: see* ***Pierre-Bloch v. France****, § 50), the right to a pension as a former member of Parliament (****Papon v. France*** *(dec.)), or a political party`s right to carry on its political activities (for a case concerning the dissolution of a party, see* ***Refah Partisi (The Welfare Party) and Others v. Turkey (dec.)****), cannot be regarded as civil rights within the meaning of Article 6 § 1. Membership of and exclusion from a political party or association are not covered by Article 6 either (****Lovrić v. Croatia****, § 55). Similarly, proceedings in which a non-governmental organisation conducting parliamentary-election observations was refused access to documents not containing information relating to the organisation itself fall outside the scope of Article 6 § 1 (****Geraguyn Khorhurd Patgamavorakan Akumb v. Armenia*** *(dec.).*

Fil-ktieb **Theory and Practice of the European Convention on Human Rights** (Fourth Ed. Intersentia), **Van Dijk, Van Hoof, Van Rijn u Zwaak** fissru l-kwistjoni tal-*political rights* fil-kuntest tal-Art 6 tal-Konvenzjoni bil-mod illi gej :-

> "*For the rights and freedoms laid down in the Convention that are of a political character, the situation is less clear. In the* ***Pierre-Bloch*** *case the*

Court held that the right to stand for elections is a "political" and not a "civil" one and that, therefore, disputes concerning the exercise of that right lie outside the scope of Article 6, even if economic interests are involved. The mere fact that in the dispute concerned the applicant`s pecuniary interests were also at stake, did not make Article 6 applicable, because these interests were closely connected with the exercise of the political right."

Fuq l-istess linja huma **Jacobs, White & Ovey** meta fil-ktieb **The European Convention on Human Rights** (7th Ed) ighidu illi :-

Disputes about access to election documentation raised by election observers are not proceedings concerned with the determination of civil rights and obligations.

Issir referenza ghad-decizjoni tal-ECHR tal-14 ta` April 2009 fil-kawza **Geraguyn Khorhurd Patgamavorakan Akumb vs Armenia** (App. No. 11721/04) fejn inghad hekk :-

a) The applicant organisation complained that the trial had been unfair.

It invoked Article 6 of the Convention which, in so far as relevant, provides:

"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

21. The Government submitted that Article 6 was not applicable to the proceedings in question. The applicant organisation instituted proceedings against a public authority which acted in its sovereign capacity. The outcome of these proceedings was not decisive for the applicant organisation`s civil rights and obligations in private law. The applicant organisation contested the alleged violation of certain rights deriving from its status as an election observer. Furthermore, these rights were of a temporary nature, arising only in the period surrounding the elections, and did not have a universal application, being limited only to a

specific group, namely election observers. However, civil rights and obligations within the meaning of Article 6 are guaranteed to everyone and cannot depend on a special status.

22. Even assuming that Article 6 was applicable, the complaint about not having access to the case file materials was ill-founded since the applicant organisation itself admitted that it was granted such access on 2 July 2003. Furthermore, it failed to exhaust the domestic remedies in respect of the complaint about the alleged non-notification about the court hearings, by not raising this issue in its appeal on points of law. Finally, as regards the assessment of evidence adduced by the applicant organisation, the evidence in question was not produced either before the District Court or the Court of Appeal, which were called upon to establish the facts of the case, and was produced for the first time only before the Court of Cassation.

However, the Court of Cassation was not authorised to examine the case on the merits, including any new evidence.

23. The applicant organisation submitted that the proceedings in question were decisive for its rights guaranteed by the Freedom of Information Act and the Code of Civil Procedure. Furthermore, its claim was examined by the courts of general jurisdiction as a civil claim. Thus, the proceedings in question determined its civil rights and obligations within the meaning of Article 6.

24. The applicant organisation further submitted that it did not have an opportunity to receive and comment on certain materials of the case file and was not notified of a number of hearings. Furthermore, the courts failed to carry out a proper assessment of the evidence produced by it, namely of the postal receipts which had the necessary postmarks photocopied on their reverse.

25. The Court notes that it is in dispute between the parties whether the proceedings in question determined the applicant organisation`s civil rights and obligations within the meaning of Article 6 § 1.

*26. The Court reiterates that the concept of "civil rights and obligations" has an autonomous meaning and cannot be interpreted solely by reference to the domestic law of the respondent State (see **König v. Germany**, 28 June 1978, § 88, Series A no. 27). The character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, etc.) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc.) are therefore of little consequence (see **Ringeisen v. Austria**, 16 July 1971, § 94, Series A no. 13).*

*Whether or not a right is to be regarded as civil within the meaning of this expression in the Convention must be determined by reference to the substantive content and effects of the right – and not its legal classification – under the domestic law of the State concerned (see **König**, cited above, § 89).*

*27. The Court further reiterates that for Article 6 § 1 to be applicable to a case it is not necessary that both parties to the proceedings should be private persons (see **Ringeisen**, cited above). Furthermore, if the case concerns a dispute between an individual and a public authority, whether the latter had acted as a private person or in its sovereign capacity is not conclusive.*

*Accordingly, in ascertaining whether a case concerns the determination of a civil right, only the character of the right at issue is relevant (see **König**, cited above, § 90).*

28. In the present case, the proceedings instituted by the applicant organisation concerned the alleged failure of the CEC to provide copies of various election related documents to which the applicant organisation enjoyed access due to its status of an election observer. This status was conferred on it under the electoral legislation and was valid for the period of the parliamentary election in question. The right of access to electionrelated documents enjoyed by the applicant organisation in the context of the parliamentary election therefore constituted a part

of a wider public function performed by election observers which pursued the aim of ensuring the publicity of an election and thereby contributing to its proper conduct and outcome. Thus, the documents which the applicant organisation sought to obtain through the court proceedings in question (for details see paragraph 4 above) did not even contain any information concerning the applicant organisation and were necessary for its performance of the abovementioned public function, which was not even remunerated. In such circumstances, the Court considers that the outcome of the proceedings in question was not decisive for the applicant organisation`s rights in private law but rather for the effective performance of its public function of an election observer. The Court therefore concludes that the proceedings in question did not concern the determination of the applicant organisation`s "civil rights and obligations" and fall outside the scope of Article 6 § 1 of the Convention.

29. It follows that this part of the application is incompatible ratione materiae with the provisions of the Convention and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

4. <u>Akkuza kriminali ghall-fini ta` l-Art 6 tal-Konvenzjoni</u>

<u>Martin Kuijer</u> (op. cit.) jittratta wkoll fil-kitba tieghu x` jikkostitwixxi '*criminal charge'* fil-kuntest tal-Art 6 tal-Konvenzjoni.

Ighid :-

"Delimitation of the concept `criminal charge` is mainly problematic in the field of administrative and disciplinary law. There is an increasing tendency within Europe to decriminalise petty offences. National authorities do not use ordinary criminal law procedures, but introduce administrative enforcement mechanisms. The Court has commented in the Öztürk case that the Convention is not opposed to decriminalisation, but that this does not mean that Article 6 is no longer applicable (ECHR, 21 February 1984, Öztürk –

Germany (Series A-73), §56). Likewise the Court stressed in the Engel case that:

"If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal […] the operation of the fundamental clauses of Article 6 and 7 would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the object and purpose of the Convention." (ECHR, 8 June 1976, Engel – Netherlands (Series A-22), §81).

The Court therefore emphasised the autonomous meaning of the concept `criminal charge`. In the Engel case the Court developed a test to determine whether an offence should be considered `criminal` for the purposes of the Convention. In the subsequent Putz case the Court stressed that these criteria are alternative, not cumulative (ECHR, 22 February 1996, Putz – Austria (Reports 1996, 312), §31). These criteria are:

- ***Classification of the offence under national law***

If a State classifies an offence as `criminal`, the Court will automatically hold Article 6 ECHR applicable.

- ***Nature of the offence***

This second criterion admittedly is rather vague. The Court will attach some importance to how the misconduct is classified in other member States of the Council of Europe. For example, in the Öztürk case the Court noted that the offence committed by Öztürk (reckless driving) continued to be classified as part of the criminal law in the vast majority of the Contracting States (see §53). The Court also attached importance to the fact that the rule of law infringed by the applicant was of a general character applicable to all citizens.

- ***Nature of the penalty***

The Court will consider national proceedings `criminal` if the purpose of the penalty imposed was "deterrent and punitive" (Öztürk, §53). Administrative measures of a preventive character will on the other hand be considered `non-criminal`. Taking away someone`s driving license for a brief period of time (i.e. the time necessary to sober up) can not be seen as being primarily `punitive`. Measures of this kind are mainly of a preventive nature in order to guarantee road safety (ECHR [GC], 28 October 1999, Escoubet – Belgium (appl. no. 26780/95), §§33-39 and ECHR (dec), 7 November 2000, Blokker – Netherlands (appl. no. 45282/99)).

- ***Severity of the penalty***

It is important to note that the Court does not look at the penalty that has actually been imposed; what is decisive is the highest possible penalty that could have been imposed. Whenever deprivation of liberty can be imposed, the Court will immediately classify an offence as being `criminal`. However, the Court also held that "[…] the lack of seriousness of the penalty at stake cannot divest an offence of its inherently criminal character" (see Öztürk, §54).

The Court has avoided, and in my opinion rightfully so, the introduction of a `de minimis rule` according to which only cases of a more serious nature enjoy the full protection of Article 6 ECHR (Judge Matscher in his dissenting opinion attached to the Öztürk case stated that the individual in the case of `regulatory offences` undoubtedly needs certain procedural guarantees, but not necessarily all those which Article 6 provides. Some commentators argued that the Court introduced such a `de minimis rule` in the Bendenoun case (ECHR, 24 February 1994, Bendenoun – France (Series A-284), §47; see, for example, M.L.W.M. Viering, "Het arrest Bendenoun: een stap terug?", in: NJB 1994, pp. 1061-1063). But other more recent cases suggest that the amount of the fine is not decisive at all (ECHR, 23 October 1995, Schmautzer – Austria (Series A-328-A), §§27-28).

The definition of the notion `charge` ("the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence" or any other measures "which carry the implication of such an allegation and which likewise substantially affect[s] the situation of the suspect" (ECHR, 10 December 1982, Foti a.o. – Italy (Series A-56), §52) is relevant when determining the starting point of criminal proceedings.

This paragraph does not intend to give an exhaustive overview of the Court`s case-law, but one practical issue should be discussed here. On occasion a defendant complains about judicial bias on the part of the judge refusing an application for legal aid. In the Gutfreund case, the Court held that the procedure for applying for legal aid does not concern the determination of a `criminal charge` in the sense of Article 6 ECHR (ECHR (dec.), 12 June 2003, Gutfreund – France (appl. no. 45681/99).

Fuq l-istess hsieb huma **<u>Dovydas Vitkauskas u Grigoriy Dikov</u>** (op. cit.).

Ighidu fil-pubblikazzjoni taghhom fuq riferita :-

*"Applicability of Article 6 under its criminal heading entails non-cumulative presence of any of the three following elements (**<u>Engel</u>**) :*

- *categorisation of an alleged offence in the domestic law as criminal (the first Engel criterion),*
- *nature of the offence (the second Engel criterion),*
- *nature and degree of severity of the possible penalty (the third Engel criterion).*

Not every decision taken by a judge in the course of criminal proceedings can be examined under the "criminal" limb of Article 6; only proceedings aimed at the determination of the criminal charge (i.e. which may result in a criminal conviction) may fall within the ambit of Article 6 under this

*head; thus Article 6 does not apply to proceedings in which the judge decides on the eventual pre-trial detention of a suspect (**Neumeister v. Austria**, §§22-25).*

*By contrast, Article 6 §2 can apply in the context of proceedings which are not "criminal" – neither by their domestic characterisation nor by their nature or penalty – where those proceedings contain a declaration of guilt (in the criminal sense) of the applicant (**Vassilios Stavropoulos v. Greece**, §§31-32).*

Categorisation in domestic law

*The question is whether the offence is defined by the domestic legal system as criminal, disciplinary, or concurring (**Engel**).*

*A clear domestic categorisation as criminal automatically brings the matter within the scope of Article 6 under the same head; however, the absence of such categorisation carries only a relative value, and then the second and third criteria are of more weight (**Weber v. Switzerland**, §§32-34).*

*Where the domestic law is unclear on the issue – as in **Ravnsborg v. Sweden** (§33), where the question arose about the domestic characterisation of a fine imposed for improper statements in court by a party to civil proceedings – it becomes inevitable to look at the second and third criteria only.*

Nature of the offence

*It is a weightier criterion than the first one – categorisation in domestic law (**Weber**, §32).*

*It entails a comparison of the domestic law and the scope of its application with other, criminal offences within that legal system (**Engel**, §§80-85).*

The domestic provisions aiming to punish a particular offence are, in principle, "criminal"; in some cases, however, the aim of punishment can coexist with the purpose of deterrence: both these

*objectives can be present, and are therefore not mutually exclusive (**Öztürk v. Germany,** §53).*

*Where the law aims to prevent an offence committed by a particular group or class of people (soldiers, prisoners, medics, etc.), there is a greater likelihood of it being regarded as disciplinary and not covered by Article 6 (**Demicoli v. Malta** , §33).*

*The fact that an offence is directed at a larger proportion of the population rather than a particular sector is just one of the relevant indicators usually indicating the "criminal" nature of the offence; extreme gravity is another one (**Campbell and Fell v. the United Kingdom**, §101).*

*At the same time, the minor nature of an offence, of itself, does not take it outside the ambit of Article 6; the "criminal" nature does not necessarily require a certain degree of seriousness (**Öztürk**, §53).*

*Where domestic law provides even a theoretical possibility of concurrent criminal and disciplinary liability, it is an argument in favour of classifying the offence as mixed. The mixed nature criterion is important in cases of a more complicated cumulative analysis, such as those undertaken in relation to breaches of prison discipline (**Ezeh and Connors v. the United Kingdom**,§§103-130).*

*Where the facts of the case are less likely to give rise to an offence outside a particular closed context (such as military barracks or prison), that offence is more likely to be defined as disciplinary and not criminal in nature (**Ezeh and Connors**,§104-106).*

*The Court takes "due allowance" of the prison context for "practical reasons of policy" when examining the applicability of Article 6 to a particular prison disciplinary regime (**Ezeh and Connors**, §104-106). It appears, therefore, that the Court takes a less stringent approach in regulating the state`s discretion in placing the dividing line between the criminal and the*

disciplinary in the prison context, if compared to the military one, for instance.

*While Article 6 does not apply to extradition (or deportation) proceedings, at least in theory, "the risk of a flagrant denial of justice in the country of destination ... which the Contracting State knew or should have known" may give rise to a positive obligation of the state under Article 6 not to extradite (**Mamatkulov and Askarov v. Turkey** [GC], §§81-91).*

*Measures imposed by the courts for the purpose of good administration of justice, such as fines, warnings or other types of disciplinary reprimand directed strictly at lawyers, prosecutors (Weber) and parties to court proceedings (Ravnsborg) are not to be considered as "criminal" in nature unless the legislation protecting the courts` reputation is so wide that it permits the reprimanding of anyone outside the strict context of the specific proceedings – as is the case with the "contempt of court" provisions in some legal systems (**Kyprianou v. Cyprus**, §31 of the Chamber judgment; but see **Zaicevs v. Latvia**). A previous statement by the Court that "the parties to court proceedings ... do not come within the disciplinary sphere of the judicial system" **(Weber**, §33) appears to have been subsequently overruled in **Ravnsborg and other cases** (§34).*

Nature and degree of severity of the penalty

*The third Engel criterion is either to be relied upon in a cumulative way where no conclusion can be reached after the analysis of the first and second elements on their own (**Ezeh and Connors**, §§108-130), or as an alternative and ultimate criterion which may attest a "criminal" charge even where the nature of the offence is not necessarily "criminal" (**Engel**).*

While the Court has recognised the advantages of decriminalising certain conduct – such as minor traffic offences – which do not result in a criminal record for the offender and relieve the system of administration of justice of less significant

*cases, states are prevented by Article 6 from arbitrarily depriving minor offenders of more ample procedural guarantees that should apply in "criminal" cases (**Öztürk**).*

*This element implies assessment of the maximum possible penalty liable to be imposed on the offender under the applicable law rather than the actual penalty imposed in the circumstances (**Ezeh and Connors**).*

*The penalty needs to be punitive rather than merely deterrent to be classified as "criminal"; in view of the punitive nature of the penalty involved, the possible degree of severity (amount) of the penalty becomes irrelevant (**Öztürk**).*

*A penalty related to deprivation of liberty as a sanction, even of a relatively low duration, almost automatically makes the proceedings "criminal". In **Zaicevs v. Latvia** (§§31-36) three days of "administrative detention" for contempt of court was regarded as placing the offence in the criminal sphere (see also **Menesheva v. Russia**, §§94-98).*

Vitkauskas u Dikov jaghtu ezempji ta` *offences of "criminal" nature* fil-kuntest tal-Art 6 tal-Konvenzjoni :-

*i) Summoning an applicant before members of parliament to investigate publishing of an article allegedly amounting to a defamatory libel, in view inter alia of the relevant legislation being directed at the population at large (**Demicoli**).*

*ii) Administrative fine for taking part in an unauthorised demonstration on the basis of the legislation for a breach of public order, relevant factors being inter alia a brief custody and questioning of the applicant by criminal investigators leading to imposition of the fine, and the fact that those types of cases were heard by criminal chambers of the domestic courts (**Ziliberberg**).*

iii) Reprimanding prisoners for gross personal violence to prison officers and mutiny could amount to a crime only in the prison context (not an offence under the general criminal law); but underlying facts could find reflection in the ordinary crimes of causing bodily harm and conspiracy, these being relevant factors in the cumulative finding of the "criminal" charge

*against the prisoners, alongside the especially grave character of the accusations (**Campbell and Fell**).*

*iv) Reprimanding prisoners for using threatening words against a probation officer and a minor assault against a prison warden was deemed to be "mixed" in nature, but was eventually classified as "criminal" following a cumulative analysis of the penalties (additional days of custody) involved (**Ezeh and Connors**).*

*v) Punishment of a lawyer for contempt of court following insulting remarks vis-à-vis the judges, in the context of the very wide field of application of the impugned law (**Kyprianou**, §31 of the Chamber judgment).*

*vi) Fine imposed on a plaintiff in criminal defamation proceedings for disclosure to the press of certain procedural documents about the pending investigation; the punishment was foreseen for parties to proceedings who were, according to the European Court of Human Rights, outside the narrow group of judges and lawyers coming within "the disciplinary sphere of the judicial system" (**Weber**, but see also **Ravnsborg**).*

Isostnu li "*a fine levied by a court on a party to civil proceedings for improper statements for the purpose of good administration of justice, the parties to legal proceedings also being bound by the "disciplinary" powers of the courts (**Ravnsborg**)*" hija ezempju ta` *"an offence found to be not "criminal" in nature".*

Jaghmlu lista ta` kazi li jinvolvu *"criminal" penalties* :

i) Committal to disciplinary unit involving deprivation of liberty for three to four months in military disciplinary proceedings (Engel).

*ii) Loss of a substantive period of remission of sentence for prison mutiny (**Campbell and Fell**).*

*iii) At least seven "additional days" of custody in the context of prison disciplinary proceedings (**Ezeh and Connors**).*

*iv) Sentence of up to one month`s imprisonment (**Kyprianou**).*

*v) Fine of 500 Swiss francs theoretically convertible into a sentence of imprisonment at the rate of one day of detention per 30 Swiss francs, even though conversion could only be imposed by a court (**Weber**; but see also a contrasting decision in **Ravnsborg**).*

*vi) Tax surcharges in addition to unpaid tax in tax assessment proceedings, in view of the punitive nature of the penalty involved (**Janosevic**).*

*vii) Motoring offences punishable by a fine, including causing a traffic accident (**Öztürk**), flight from the scene (**Weh v. Austria**), exceeding the speed limit (**O`Halloran and Francis**), in view of the punitive nature of the penalties involved.*

Jelenkaw kazi li ma jinvolvu ebda *"criminal" penalty* :

*i) Light arrest (not involving deprivation of liberty) or a two-day period of strict arrest in military disciplinary proceedings (**Engel**).*

*ii) Compulsory transfer of a military officer to the reserve list in military disciplinary proceedings (**Saraiva de Carvalho v. Portugal**).*

*iii) Fine of 1000 Swedish kronor, theoretically convertible into a sentence of imprisonment from fourteen days to three months; the Court considered that the possibility of such conversion was remote and would have necessitated a separate court hearing, with the result that the degree of severity of the penalty was not enough to be labelled as "criminal" (**Ravnsborg**; but see a contrasting decision in very similar circumstances in **Weber**).*

*iv) Employment proceedings leading to dismissal of prosecutor in case of alleged bribery (**Ramanauskas**, dec.).*

*v) Dismissal of state officials under national security legislation on the grounds of alleged lack of loyalty to the state (**Sidabras and Džiautas v. Lithuania**, dec.).*

*vi) Warning issued to lawyer in disciplinary proceedings (**X v. Belgium**, dec. 1980).*

*vii) Fine imposed on teacher for having gone on strike (**S. v. Germany**, dec. 1984).*

*viii) Compulsory residence order restricting to a particular locality a person whose alleged mafia-type connections constituted a threat to public order (**Guzzardi**).*

*ix) Deportation on security grounds, even if based on suspicion of criminal activity (**Agee v. the United Kingdom**), or on grounds of illegal entry into to the country where it is an offence in itself (**Zamir v. the United Kingdom**).*

*x) Extradition proceedings, unless the question of a positive obligation arises under Article 6 in consideration of the likelihood of the "flagrant denial of justice in the country of destination" (**Mamatkulov and Askarov**).*

*xi) Restrictions on insurance business on the ground that the controller was not a fit and proper person, even though the allegations against him at least arguably included allegations of criminal conduct (**Kaplan v. the United Kingdom**).*

*xii) Fine imposed on a pharmacist for unethical behaviour involving irregular pricing of drugs (**M. v. Germany**, dec. 1984).*

5. Gurisprudenza

a) Pierre-Bloch v. France
(App. No. 120/1996/732/938) - ECHR - 21 ta` Ottubru 1997

Kaz b`mertu li joqrob ghall-fattispeci tal-kwistjoni tal-lum, u li rrefera ghalih l-Avukat Generali, kien dak fl-ismijiet **Pierre-Bloch v. France** (App No. 120/1996/732/938) deciz mill-ECHR fil-21 ta` Ottubru 1997.

L-ECHR kellha tqis jekk l-imposizzjoni ta` sanzjonijiet ta` flus fuq kandidati fil-kuntest ta` elezzjoni kenitx tammonta ghad-determinazzjoni ta` drittijiet u obbligi civili u/jew ta` akkuza kriminali fl-ambitu tal-Art 6 tal-Konvenzjoni, jew kenitx kwistjoni ta` sanzjonijiet li jibqghu min-natura taghhom drittijiet politici.

B`seba` (7) voti favur u tnejn (2) kontra, l-ECHR tat decizjoni fis-sens illi s-sanzjonijiet fi flus imposti fuq kandidat ta` elezzjoni ma jirrendux dawk is-sanzjonijiet bhala ammontanti ghad-determinazzjoni ta` drittijiet u obbligi civili u/jew akkuza kriminali.

L-ECHR ghamlet dawn l-osservazzjonijiet dwar jekk il-kwistjoni kenitx tirrigwarda drittijiet u obbligi civili :-

> *49. As it was not in issue that there had been a "contestation" (dispute), the Court`s task is confined*

to ascertaining whether the dispute related to "civil rights and obligations".

50. It observes that, like any other parliamentary candidate, Mr Pierre-Bloch was required by law not to spend more than a specified sum on financing his campaign. The Constitutional Council held that the sum in question had on this occasion been exceeded and disqualified the applicant from standing for election for a year and declared that he had forfeited his seat, thereby jeopardising his right to stand for election to the National Assembly and to keep his seat. Such a right is a political one and not a "civil" one within the meaning of Article 6 § 1, so that disputes relating to the arrangements for the exercise of it – such as ones concerning candidates` obligation to limit their election expenditure – lie outside the scope of that provision.

51. It is true that in the proceedings in question the applicant`s pecuniary interests were also at stake. Where the Constitutional Council has found that the ceiling on election expenditure has been exceeded, the National Commission assesses a sum equal to the amount of the excess, which the candidate is required to pay the Treasury. The proceedings before the National Commission are not separable from those before the Constitutional Court since the National Commission has no discretion and is required to adopt the amount determined by the Constitutional Council (see paragraph 35 above). Furthermore, reimbursement in whole or in part of the expenditure recorded in campaign accounts, where provided for by law, is not possible until the accounts have been approved by the National Commission (see paragraph 33 above). This economic aspect of the proceedings in issue does not, however, make them "civil" ones within the meaning of Article 6 § 1. The impossibility of securing reimbursement of campaign expenditure where the ceiling has been found to have been exceeded and the obligation to pay the Treasury a sum equivalent to the excess are corollaries of the obligation to limit election expenditure; like that obligation, they form part of the arrangements for the exercise of the right in question. Besides, proceedings do not become "civil" merely because

they also raise an economic issue (see, for example and mutatis mutandis, ***the Schouten and Meldrum v. the Netherlands*** *judgment of 9 December 1994, Series A no. 304, p. 21, § 50, and the* ***Neigel v. France*** *judgment of 17 March 1997, Reports 1997-II, p. 411, § 44).*

52. Article 6 § 1 accordingly did not apply in its civil aspect. »

L-ECHR ghamlet dawn il-konsiderazzjonijiet dwar jekk il-materja kenitx tinkwadra f`akkuza kriminali :-

53. As it was not disputed that there had been a "charge", the Court`s task is confined to ascertaining whether it was a criminal one. For this purpose it has regard to three criteria: the legal classification of the offence in question in national law, the very nature of the offence and the nature and degree of severity of the penalty (see, in particular, the ***Engel and Others v.the Netherlands*** *judgment of 8 June 1976, Series A no. 22, p. 35, § 82, and* ***the Putz v. Austria judgment*** *of 22 February 1996, Reports 1996-I, p. 324, § 31).*

(a) Legal classification of the offence in French law and the very nature of the offence

54. The Elections Code establishes the principle of capping election expenditure by parliamentary candidates (Article L. 52-11 – see paragraph 22 above) and monitoring compliance with that principle (see paragraphs 23–32 above). The National Commission examines the campaign accounts of all candidates and, if it considers that the maximum permitted amount has been exceeded by one of them, it refers the case to the Constitutional Council, the body with jurisdiction over the election of MPs (to which application can also be made by private individuals). Where the Constitutional Council subsequently finds that the maximum permitted amount has been exceeded, the candidate in question can be disqualified from standing for election for a period of a year (Articles L. 118-3, L.O. 128 and L.O. 136-1 – see paragraph 37 above) and he is required to pay the Treasury a

sum equal to the amount of the excess as determined by the National Commission (Article L. 52-15 – see paragraph 34 above). Those provisions – the only ones relevant in the instant case – clearly do not belong to French criminal law but, as the title of the Elections Code chapter in which they appear confirms, to the rules governing the "financing and capping of election expenditure" and therefore to electoral law. Nor can a breach of a legal rule governing such a matter be described as "criminal" by nature.

(b) Nature and degree of severity of the penalty

55. Three "penalties" are or may be imposed on candidates who do not keep within the statutory limit on expenditure: disqualification from standing for election, an obligation to pay the Treasury a sum equal to the amount of the excess, and the penalties provided in Article L. 113-1 of the Elections Code.

(i) Disqualification

56. The Constitutional Council may disqualify from standing for election for a period of one year any candidate whom it finds to have exceeded the maximum permitted amount of election expenditure; if, as in the instant case, the candidate has been elected, the Council declares him to have forfeited his seat. The purpose of that penalty is to compel candidates to respect the maximum limit. The penalty is thus directly one of the measures designed to ensure the proper conduct of parliamentary elections, so that, by virtue of its purpose, it lies outside the "criminal" sphere. Admittedly, as the applicant pointed out, disqualification from standing for election is also one of the forms of deprivation of civic rights provided in French criminal law.

Nevertheless, in that instance the penalty is "ancillary" or "additional" to certain penalties imposed by the criminal courts (see paragraph 39 above); its criminal nature derives in that instance from the "principal" penalty to which it attaches.

The disqualification imposed by the Constitutional Council is, moreover, limited to a period of one year from the date of the election and applies only to the election in question, in this instance the election to the National Assembly.

57. In short, neither the nature nor the degree of severity of that penalty brings the issue into the "criminal" realm.

(ii) The obligation to pay the Treasury a sum equal to the amount of the excess

58. Where the Constitutional Council has found that the maximum permitted amount of election expenditure has been exceeded, the National Commission assesses a sum equal to the amount of the excess, which the candidate is required to pay to the Treasury. The Court has already indicated that the proceedings before the National Commission are not separable from those before the Constitutional Council (see paragraph 51 above).

The obligation to pay relates to the amount by which the Constitutional Council has found the ceiling to have been exceeded. This would appear to show that it is in the nature of a payment to the community of the sum of which the candidate in question improperly took advantage to seek the votes of his fellow citizens and that it too forms part of the measures designed to ensure the proper conduct of parliamentary elections and, in particular, equality of the candidates. Furthermore, apart from the fact that the amount payable is neither determined according to a fixed scale nor set in advance, several features differentiate this obligation to pay from criminal fines in the strict sense: no entry is made in the criminal record, the rule that consecutive sentences are not imposed in respect of multiple offences does not apply, and imprisonment is not available to sanction failure to pay. In view of its nature, the obligation to pay the Treasury a sum equal to the amount of the excess cannot be construed as a fine.

59. In short, the nature of the penalty in the instant case likewise does not bring the issue into the "criminal" realm.

(iii) The penalties provided in Article L. 113-1 of the Elections Code 60. Article L. 113-1 of the Elections Code provides that a candidate who has exceeded the ceiling on election expenditure is liable to a fine of FRF 25,000 and/or a year`s imprisonment (see paragraph 38 above), penalties which would be imposed by the ordinary criminal courts. The nature of those penalties is the less in doubt as Article L. 113-1 is included in the "Criminal provisions" chapter of the relevant part of the Elections Code. These penalties are not, however, in issue in this case as no proceedings were brought against the applicant on the basis of that Article.

(c) Conclusion

61. Having regard to all the foregoing considerations, the Court concludes that Article 6 § 1 did not apply in its criminal aspect either.

Fid-*dissenting opinion* tieghu Judge Jan de Meyer ghamel dawn ir-rilievi :-

II. Civil nature of the case

On the one hand, the Court says that the right of a French citizen "to stand for election to the National Assembly and to keep his seat" is "a political one and not a `civil` one within the meaning of Article 6 § 1".

The distinction between civil rights and political rights is strange in itself if one considers the etymology of the two adjectives, seeing that the Latin words from which the former is derived (civile, civis, civitas) and the Greek words from which the latter is derived (politikon, politis, politeia) mean the same thing.

This distinction – like the one between private law and public law, to which it is linked – has all too

often served to remove from the scope of the ordinary law situations affecting the exercise of what is called public authority (puissance publique) and to reduce the scope of the protection of citizens in relation to such situations.

Are "civil" rights therefore not essentially, in the most literal meaning of the term, the rights of the citizen (civis)?

Are not so-called "political" rights themselves rights of that type, "civil" rights par excellence? Is that not the case with the jus suffragii and the jus honorum, which are precisely what we are dealing with in the instant case?

In reality "political" rights are a special category of "civil" rights. Indeed, they are more "civil" than others in that they are more directly inherent in citizenship and, furthermore, are normally exclusive to citizens.

Where human rights are concerned, and more particularly where disputes over rights or obligations are to be determined, there is nothing to justify treating those who lay claim to a "political" right, such as those who are candidates in an election, more or less favourably than other citizens. (The Court is accordingly also wrong, in my view, to have said several times that disputes relating to the "recruitment, careers and termination of service of civil servants", who are distinguished from "employees governed by private law", "are as a general rule outside the scope of Article 6 § 1" (see, among other authorities, the following judgments: ***Francesco Lombardo v. Italy****, 26 November 1992, Series A no. 249-B, p. 26, § 17;* ***Giancarlo Lombardo v. Italy****, 26 November 1992, Series A no. 249-C, p. 42, § 16;* ***Massa v. Italy****, 24 August 1993, Series A no. 265-B, p. 20, § 26; and* ***Neigel v. France****, 17 March 1997, Reports of Judgments and Decisions 1997-II, p. 411, § 44; and the judgments delivered on 2 September 1997 in the following cases:* ***Spurio v. Italy****, Reports 1997-V, pp. 1580-81, § 18;* ***Gallo v. Italy****, ibid., p. 1591, § 19;* ***Zilaghe v. Italy****, ibid., p. 1602, § 19;* ***Laghi v. Italy****, ibid., p. 1614, § 17;* ***Viero v. Italy****, ibid., p.*

*1626, § 16; **Orlandini v. Italy**, ibid., p. 1637, § 18; **Ryllo v. Italy**, ibid., pp. 1648-49, § 19; **Soldani v. Italy**, ibid., p. 1719, § 18; **Fusco v. Italy**, ibid., p. 1732, § 20; **Di Luca and Saluzzi v. Italy**, ibid., p. 1744, § 18; **Pizzi v. Italy**, ibid., p. 1754, § 8; **Scarfò v. Italy**, ibid., pp. 1767-68, § 18; **Argento v. Italy**, ibid., pp. 1779-80, § 18; and **Trombetta v. Italy**, ibid., pp. 1791-92, § 21). It has, however, recognised the "civil character" of "an obligation on the State to pay a pension to a public servant" or "to a judge in accordance with the legislation in force" or to pay, similarly, a reversionary pension to the husband of a public servant. It explained this by remarking that "[the State] may be compared, in this respect, to an employer who is a party to a contract of employment governed by private law" (**Francesco Lombardo, Giancarlo Lombardo and Massa judgments** cited above). Why only in that "respect"? Very recently, the Court seems similarly to have accepted, more generally, in four cases concerning remuneration issues, that a civil servant relies on a civil right when what is concerned is a "purely economic right legally derived from her work" (see the **Lapalorcia v. Italy** judgment of 2 September 1997, Reports 1997-V, p. 1677, § 21; see also the judgments delivered on the same day in the cases of **De Santa v. Italy**, ibid., p. 1663, § 18; **Abenavoli v. Italy**, ibid., p. 1690, § 16, and **Nicodemo v. Italy**, ibid., p. 1703, § 18). Why should the same not apply to the other rights attaching to the performance of the duties of what is called the "civil service"?)*

III. Criminal nature of the case

On the other hand, the Court declines to recognise the "criminal" nature of the penalties imposed on the applicant for having exceeded the maximum permitted amount of election expenditure – disqualification from standing for election for a year and the obligation to pay the Treasury a sum equal to the amount of the excess.

"In accordance with the ordinary meaning to be given to the terms" (Article 31 § 1 of the Vienna Convention on the Law of Treaties) in everyday language (See, mutatis mutandis, my dissenting

opinion in the Putz v. Austria judgment of 22 February 1996, Reports 1996-I, pp. 329–34, in particular paragraphs 2–7), are these not true "penalties" and even rather serious penalties?

There is nothing to warrant the statement that such penalties are not "criminal" by nature or even that they "clearly do not belong to French criminal law". That cannot simply be inferred from the fact that the relevant provisions "appear in an elections code" and "belong to electoral law".

A penalty imposed on someone for having done what he was forbidden to do or for not having done what he was under an obligation to do does not cease to be a penalty merely because it is imposed on him under a law that is distinct from the Criminal Code, such as a regulatory offences act or road traffic code (Öztürk v. Germany judgment of 21 February 1984, Series A no. 73, p. 9, § 11, and pp. 18–21, §§ 51–53), a tax code or tax regulations (See the following judgments: ***Bendenoun v. France****, 24 February 1994, Series A no. 284, p. 20, § 47;* ***A.P., M.P. and T.P. v. Switzerland****, 29 August 1997, Reports of Judgments and Decisions 1997-V, p. 1784, § 19, and p. 1488, § 42; and* ***E.L., R.L. and J.O.-L. v. Switzerland****, 29 August 1997, Reports 1997-V, p. 1515, § 19, and p. 1520, § 47.4), a code of criminal procedure (****Weber v. Switzerland*** *judgment of 22 May 1990, Series A no. 177, pp. 17–18, § 315 or an ordinance concerning the privileges and powers of a parliamentary assembly (****Demicoli v. Malta*** *judgment of 27 August 1991, Series A no. 210, p. 9, § 11, pp. 12–13, § 20, and pp. 16–17, §§ 32–33. 6).*

Of similarly small importance is the "degree of severity of the penalty": even a minor penalty remains a penalty. It is, at all events, surprising in the present case that an amount of 59,572 French francs is not considered sufficiently large for it to constitute a "criminal" penalty for the purposes of Article 6 § 1 (The Court remains cautiously silent on this matter in paragraphs 58 and 59 of the judgment), when it was accepted that 60 German marks were sufficient in the ***Öztürk case*** *(Öztürk judgment cited above, p. 9, § 11, p. 10, § 18, and p. 21, § 54. In this case the maximum provided in the*

Act was 1,000 marks; the Court observed: "The relative lack of seriousness of the penalty at stake … cannot divest an offence of its inherently criminal character."), 300 Swiss francs in the ***Weber case*** *(Weber judgment cited above, p. 18, § 34.) and 250 Maltese liri in the* ***Demicoli case*** *(Demicoli judgment cited above, p. 17, § 34.).*

Fid-*dissenting opinion* tieghu Judge Uno Lohmus qal :-

1. I do not share the opinion of the majority of the Court, which concluded, in paragraphs 57 and 59 of its judgment, that neither the nature nor the degree of severity of the penalties brought the issue into the criminal realm and that consequently Article 6 did not apply in the instant case

2. Article L. 113-1 of the Elections Code provides that a candidate who has exceeded the ceiling on election expenditure is liable to a fine of 25,000 French francs (FRF) and/or a year`s imprisonment, penalties which would be imposed by the ordinary criminal courts. It is true that these penalties are not in issue in this case as no proceedings were brought against the applicant on the basis of that Article. Nevertheless, disqualification is a form of deprivation of civic rights and the order to pay the Treasury the sum of FRF 59,372 amounts in a sense to a fine.

3. In the case of ***Schmautzer v. Austria*** *the federal police authority in Graz had imposed on the applicant a fine of 300 Austrian schillings with twenty-four hours` imprisonment in default of payment for driving his car without wearing his safety-belt. The Court noted: "although the offences in issue and the procedures followed in the case fall within the administrative sphere, they are nevertheless criminal in nature" (see* ***the Schmautzer v. Austria judgment*** *of 23 October 1995, Series A no. 328-A, p. 13, § 28).*

Comparing these two cases, I find it difficult to understand why Article 6 does not apply in the instant case.

4. The Court analysed the nature and the degree of severity of the penalties (disqualification and the obligation to pay the Treasury a sum equal to the amount of the excess). The Court found that neither the nature nor the degree of severity of the penalty brought the issue into the criminal realm. As both of the "deterrent measures" were imposed on the applicant, their combined effect must be taken into account when the nature and the degree of severity of the penalty is being determined.

5. I am not convinced by the fact that the deprivation of civic rights provided in French criminal law is a supplementary punishment and that the disqualification imposed by the Constitutional Council is limited to a period of one year from the date of the election (paragraph 56 of the judgment).

`Having regard to the nature and degree of severity of the penalties as a whole, I find there was a "criminal charge" within the meaning of Article 6 § 1.

b) <u>Janosevic v. Sweden</u>
<u>(App No. 34619/1997) – ECHR - 23 ta` Lulju 2002</u>

Dan il-kaz kien jittratta multa ta` taxxa addizzjonali imposta minn awtorita` amministrattiva. L-ECHR kienet tal-fehma illi peress li l-kwistjoni kienet dwar taxxa, ghalkemm il-materja ma kinitx tinkwadra fil-parametri ta` *civil rights and obligations,* kienet kienet tammonta ghal kwistjoni ta` natura penali.

Inghad hekk :

64. The Court has consistently held that, generally, tax disputes fall outside the scope of "civil rights and obligations" under Article 6 of the Convention, despite the pecuniary effects which they necessarily produce for the taxpayer (see, as the most recent authority, Ferrazzini, cited above, § 29). The facts of the present case do not give reason to review that conclusion.

65. Having regard to the fact that tax surcharges were imposed on the applicant, the question arises whether the proceedings in the present case instead involved a determination of a "criminal charge". The Court reiterates that the concept of "criminal charge" within the meaning of Article 6 is an autonomous one. In determining whether an offence qualifies as "criminal", three criteria are to be applied: the legal classification of the offence in domestic law, the nature of the offence and the nature and degree of severity of the possible penalty (see, among other authorities, ***Öztürk v. Germany****, judgment of 21 February 1984, Series A no. 73, p. 18, § 50, and* ***Lauko v. Slovakia****, judgment of 2 September 1998, Reports of Judgments and Decisions 1998-VI, p. 2504, § 56).*

66. As regards the domestic classification of tax surcharges, the Court notes that they are not imposed under criminal-law provisions but in accordance with various tax laws. Moreover, they are determined by the tax authorities and the administrative courts. It further appears that the Swedish legislature and the courts have considered that, under the Swedish legal system, the surcharges are not characterised as criminal penalties but rather as administrative sanctions (see the judgment of the Supreme Administrative Court, cited at paragraph 52 above). Consequently, although in some respects the surcharges have been placed on an equal footing with criminal penalties, the Court finds that the surcharges cannot be said to belong to criminal law under the domestic legal system.

67. It is therefore necessary to examine the surcharges in the light of the second and third criteria mentioned above. These criteria are alternative and not cumulative: for Article 6 to apply by virtue of the words "criminal charge", it suffices that the offence in question should by its nature be "criminal" from the point of view of the Convention, or should have made the person concerned liable to a sanction which, by its nature and degree of severity, belongs in general to the "criminal" sphere. This does not exclude that a cumulative approach may be adopted where the

*separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a "criminal charge" (see **Lauko**, cited above, pp. 2504-05, § 57).*

68. As regards the nature of the conduct imputed to the applicant, the Court notes that the Tax Authority and the County Administrative Court found that the applicant had supplied incorrect information in his tax returns. The resultant tax surcharges were imposed in accordance with tax legislation – inter alia, Chapter 5, sections 1 and 2, of the Taxation Act – directed towards all persons liable to pay tax in Sweden and not towards a given group with a special status.

Moreover, although there is, as argued by the Government, a public financial interest in ensuring that the tax authorities have adequate and correct information when assessing tax, this information is secured by means of certain requirements laid down in Swedish tax legislation, to which is attached the threat of a considerable financial penalty for noncompliance.

*It is true that the tax surcharges were imposed on the applicant on objective grounds without the need to establish any criminal intent or negligence on his part. However, the lack of subjective elements does not necessarily deprive an offence of its criminal character; indeed, criminal offences based solely on objective elements may be found in the laws of the Contracting States (see **Salabiaku v. France**, judgment of 7 October 1988, Series A no. 141-A, p. 15, § 27). In this connection, the Court notes that the present system of tax surcharges has replaced earlier purely criminal procedures. It appears that the change from the earlier system, which was one of penalties for intentional or negligent conduct, to the new system based on objective factors was prompted by the need for greater efficiency (see paragraph 32 above).*

Furthermore, the present tax surcharges are not intended as pecuniary compensation for any costs that may have been incurred as a result of the taxpayer`s conduct. Rather, the main purpose of the

*relevant provisions on surcharges is to exert pressure on taxpayers to comply with their legal obligations and to punish breaches of those obligations. The penalties are thus both deterrent and punitive. The latter character is the customary distinguishing feature of a criminal penalty (see **Öztürk**, cited above, pp. 20-21, § 53).*

In the Court`s opinion, the general character of the legal provisions on tax surcharges and the purpose of the penalties, which are both deterrent and punitive, suffice to show that for the purposes of Article 6 of the Convention the applicant was charged with a criminal offence.

*69. The criminal character of the offence is further evidenced by the severity of the potential and actual penalty. Swedish tax surcharges are imposed in proportion to the amount of the tax avoided by the provision of incorrect or inadequate information. The surcharges, normally fixed at 20% or 40% of the tax avoided, depending on the type of tax involved, have no upper limit and may come to very large amounts. Indeed, in the present case the surcharges imposed by the Tax Authority`s decisions were very substantial, totalling SEK 161,261. It is true that surcharges cannot be converted into a prison sentence in the event of non-payment; however, this is not decisive for the classification of an offence as "criminal" under Article 6 (see **Lauko**, cited above, p. 2505, § 58).*

70. The Court also notes that the Supreme Court considered in its judgment of 29 November 2000 (see paragraph 51 above) that there were weighty arguments for regarding Article 6 as being applicable under its criminal head to proceedings involving tax surcharges. Furthermore, the Supreme Administrative Court, in its judgments of 15 December 2000 (see paragraphs 52-55 above), held that the Swedish tax surcharge is to be regarded as falling under Article 6.

71. To sum up, the Court concludes that the proceedings concerning the tax surcharges imposed on the applicant involved a determination of a "criminal charge" within the meaning of Article 6 of

the Convention. This provision is therefore applicable in the present case.

c) <u>Angelo Zahra v. Prim Ministru et</u>
Qorti Kostituzzjonali - 29 ta` Mejju 2015

Il-Qorti kienet mitluba tiddikjara li normi tal-ligi tal-FSS kienu jiksru d-drittijiet tar-rikorrent kif tutelati bil-Kostituzzjoni u bil-Konvenzjoni.

Fid-decizjoni taghha, il-Qorti Kostituzzjonali ghamlet dawn l-osservazzjonijiet :-

25. Fir-rigward din il-Qorti tosserva li hemm certu kazijiet fejn il-multa amministrattiva tant tkun severa li tikkwalifika bhala piena penali ghax tenut kont tas-severita` taghha titqies derivanti minn akkuza kriminali ghall-finijiet tal-Artikolu 6 tal-Konvenzjoni tal-Artikolu 39 tal-Kostituzzjoni.

26. Fil-kaz odjern huwa minnu li, filwaqt li l-piena imposta mill-Qorti hija wahda definittiva, dik amministrattiva m`hijiex definittiva u dan peress li, ai termini tal-Artikolu 23 [8] tal-Att Dwar l-Amministrazzjoni tat-Taxxa Kap. 372, din tista` tigi irtirata parzjalment jew fl-intier taghha mill-Kummissarju. Huwa wkoll minnu li, skont il-proviso tas-subinciz 7 tal-istess att, dik it-taxxa tista` wkoll tigi kontestata quddiem qorti fiz-zmien hmistax-il jum min-notifika tal-avviz.

Huwa minnu wkoll li skont ir-regolament nurmu 24 tal-Legislazzjoni Sussidjarja 372.14 intestata "Regoli Dwar Final Settlement System [FSS]", il-pagatur li jhossu aggravat bid-decizjoni jista` ai termini tas-subinciz 3 jipprezenta ittra ta` kontestazzjoni lill-Kummissarju fi zmien ghaxart ijiem min-notifika, u skont is-subinciz [5], dan jista` jahfer it-taxxa addizzjonali, parzjalment jew fl-intier taghha, jekk ikun sodisfatt li n-nuqqas tal-pagatur ma jkunx dovut ghal xi htija jew negligenza tieghu.

27. Izda mill-provi akkwiziti jirrizulta li l-multi mitluba mid-Direttur minghand ir-rikorrent

potenzjalment ilahhqu eluf kbar ta` euro u ghalhekk huma sostanzjali. Ukoll ma jirrizultax li dawn gew irtirati mid-Direttur. Ghalhekk meta l-pulizija agixxiet kontra r-rikorrent billi tat bidu ghall-proceduri kriminali kontra tieghu ghar-reati bazati fuq l-istess fatti – li juri li l-fatti huma klassifikati bhala reat kriminali – li fuqhom kienu diga` gew imposti l-multi "amministrattivi", dawn il-multi kienu gja` fis-sehh. Minn dan jirrizulta car li bit-tehid kontra r-rikorrent ta` proceduri kriminali wara li gia` gew imposti l-multi "amministrattivi", ir-rikorrent mhux talli gie processat darbtejn fuq l-istess fatti, izda talli gie wkoll penalizzat darbtejn in vjolazzjoni tal-artikolu konvenzjonali fuq citat.

d) <u>Federation of Estate Agents v. Direttur Generali (Kompetizzjoni) et</u> : Qorti Kostituzzjonali - 3 ta` Mejju 2016

Din il-kawza kienet tittratta ilment tar-rikorrenti dwar proceduri li kienu inizjati kontra taghha skont l-Att dwar il-Kompetizzjoni ["Kap. 379"]. Ir-rikorrenti lmentat li dawk il-proceduri saru bi ksur tal-Art 39 tal-Kostituzzjoni u tal-Art 6 tal-Konvenzjoni.

L-Ewwel Qorti kienet qalet hekk :-

Il-kaz in ezami jirrigwarda l-kompatibiltà o meno tal-Kap. 379 tal-Ligijiet ta` Malta mal-artikolu 39(1) tal-Kostituzzjoni ta` Malta u l-artikolu 6(1) tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bnieden u tal-Libertajiet Fondamentali.

Skond il-Kap. 379 tal-Ligijiet ta` Malta, id-Direttur Generali (Kompetizzjoni) u l-Ufficcju ghall-Kompetizzjoni istitwit permezz tal-artikolu 13 tal-Kap. 510 ghandhom is-setgha jinvestigaw (art. 12 tal-Kap. 379), jiddeterminaw u jrazznu agir meqjus li jxekkel il-kompetizzjoni fis-suq ai termini tal-artikoli 5 u 9 tal-Kap. 379.

Suspettat agir illegittimu b`allegat ksur tal-artikoli 5 u 9 tal-Kap. 379 u l-artikoli 101 u 102 tat-Trattatt dwar il-Funzjonijiet [recte, Funzjonament] tal-Unjoni Ewropea, id-Direttur Generali johrog

stqarrija t`oggezzjoni skond l-art 12A tal-Kap. 379 bid-dritt … …… tal-intrapriza rilevanti ghas-sottomissjonijiet taghha.

Artikolu 12A(6) u artikolu 12D tal-Kap. 379 jakkorda[w] lid-Direttur Generali, apparti dmirijiet t`investigazzjoni u poteri amministrativi, id-dover li jiddeciedi u jistabilixxi ksur o meno tal-Kap. 379 jew tat-Trattatt. Darba stabilita l-vjolazzjoni, id-Direttur Generali ghandu johrog l-ordnijiet necessarji (artikolu 13 Kap.379) inkluz imposizzjoni ta` "multa ammistrattiva ta` mhux aktar minn ghaxra fil-mija tad-dhul totali tal-intrapriza jew ghaqda ta` intraprizi koncernati" – vide artikolu 21 Kap. 379.

F`kaz ta` nuqqas ta` hlas tal-multa inflitta, l-ghaqda titqies li ikkomettiet "reat" u ergo hija soggetta ghal multa ulterjuri bejn elf u ghoxrin elf euro.

Mid-decizjoni tad-Direttur Generali hemm dritt t`appell quddiem it-Tribunal t`Appell tal-Kompetizzjoni u tal-Konsumatur (Tribunal Appell) skond artikolu 13A(1) Kap. 379. It-Tribunal Appell, skond l-artikolu 31 tal-Kapitolu 510, huwa kompost minn imhallef u zewg membri ordinarji nominati mill-President ghal perjodu ta` tliet snin. Appell ma jissospendix awtomatikament il-multa amministrattiva inflitta, izda talba apposita tista` ssir lit-Tribunal.

Hemm dritt t`appell mid-decizjoni tat-Tribunal quddiem il-Qorti tal-Appell fuq punt ta` ligi biss – vide artikolu 13A(5) Kap. 379.

Qabel id-dhul fis-sehh tal-Kap. 379 f`Mejju 2011, il-ligi kienet tipprovdi ghal Ufficcju jew Direttur tal-Kompetizzjoni Gusta li kellu d-dritt jinvestiga allegat ksur, izda kienet il-Qorti tal-Magistrati li setghat timponi multi u dana f`kaz ta` sejbien ta` htija in segwitu ta` proceduri kriminali.

Fil-kaz in ezami, wara investigazzjoni, id-Direttur Generali (Kompetizzjoni) hareg … statement of objections fl-1 t`Awissu 2013. Id-Direttur Generali li investiga l-allegat ksur hija l-istess persuna li ser

tiddeciedi dwar l-allegat ksur u tista` timponi multa ta` circa €1.2 miljun … … …

Ikkonsidrat :

Il-qorti rat u ezaminat l-artikolu 39 tal-Kostituzzjoni ta` Malta …….u l-artikolu 6(1) tal-Konvenzjoni Ewropea ….

Il-kwistjonijiet ewlenin li jehtiegu jigu analizzati huma :

(i) jekk il-proceduri taht il-Kap. 379 ghandhomx il-fattizzi ta` reati jew akkuzi kriminali ;
(ii) jekk id-Direttur Generali u t-Tribunal Appell jistghux jitqiesu bhala "qorti" ;
(iii) jekk Direttur Generali/Tribunal Appell humiex tribunal indipendenti u imparzjali.

Ikkonsidrat :

Il-protezzjoni mahsuba bl-artikolu 39(1) tal-Kostituzzjoni tinghata kemm-il darba persuna tkun akkuzata b`reat kriminali.

Fil-kaz in ezami, il-multa amministrattiva mahsuba hija skond l-artikolu 21 tal-Kap. 379 u cioè ghaxra fil-mija tat-turnover tal-ghaqda, stmat €12,478,994.34 – cioè multa ta` €1,247,800.

Din il-piena hija tali li tikkaratterizza n-natura tal-offiza bhala wahda kriminali? In-nomenklatura moghtija lil multa bhala multa amministrattiva hija evidenza konklusiva tan-natura tal-offiza?

*Il-Qorti Ewropea fis-sentenza taghha **Engel and Others v. the Netherlands** (App. No 5100/71, 5102/71, 5354/72, 5370/72) deciza fit-8 ta` Gunju 1976 stabbiliet il-criteria ghad-determinazzjoni ta` natura korretta t`offiza partikolari, illum maghrufa bhala l-Engel Criteria. Infatti f`paragrafu 82 tas-sentenza l-Qorti Ewropea affermat :*

"82. Hence, the Court must specify, limiting itself to the sphere of military service, how it will determine whether a given `charge` vested by the State in question – as in the present case – with a

disciplinary character nonetheless counts as `criminal` within the meaning of article 6 (art. 6).

"In this connection, it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States.

"The very nature of the offence is a factor of greater import. When a serviceman finds himself accused of an act or omission allegedly contravening a legal rule governing the operation of the armed forces, the State may in principle employ against him disciplinary law rather than criminal law. In this respect, the Court expresses its agreement with the Government.

"However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring. In a society subscribing to the rule of law, there belong to the `criminal` sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so (see, mutatis mutandis, the ***De Wilde, Ooms and Versyp*** *judgment of 18 June 1971, Series A no. 12, p. 36, last subparagraph, and p. 42 in fine)."*

Illi di più … il-qorti kompliet tirritieni :

"If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a `mixed` offence on the disciplinary rather than on

the criminal plane, the operation of the fundamental clauses of articles 6 and 7 (art. 6, art. 7) would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under article 6 (art. 6) and even without reference to articles 17 and 18 (art. 17, art. 18), to satisfy itself that the disciplinary does not improperly encroach upon the criminal. In short, the `autonomy` of the concept of `criminal` operates, as it were, one way only."

Dawn il-kriterji gew abbraccati f`diversi sentenzi tal-Qorti Ewropea … … …

Tifsira ampja tal-kriterja ghad-determinazzjoni korretta tal-aspett kriminali o meno tal-offiza hija dik moghtija fil-kaz ***Jussila v. Finland*** *(App. 73053/01) fejn jinghad :*

"The Court`s established case-law sets out three criteria to be considered in the assessment of the applicability of the criminal aspect. These criteria, sometimes referred to as the `Engel criteria`, were most recently affirmed by the Grand Chamber in ***Ezeh and Connors v. the United Kingdom*** *([GC] nos 39665/98 and 40086/98, § 82, ECHR 2003-X).*

"... [I]t is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States.

"The very nature of the offence is a factor of greater import. ... However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring. ..."

*"The second and third criteria are alternative and not necessarily cumulative. It is enough that the offence in question is by its nature to be regarded as criminal or that the offence renders the person liable to a penalty which by its nature and degree of severity belongs in the general criminal sphere (see **Ezeh and Connors**, cited above, § 86). The relative lack of seriousness of the penalty cannot divest an offence of its inherently criminal character (see **Ozturk v. Germany**, 21 February 1984, § 54, Series A no. 73; see also **Lutz v. Germany**, 25 August 1987, § 55, Series A no. 123).*

*This does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (see **Ezeh and Connors**, cited above, § 86, citing, inter alia, **Bendenoun**, cited above, § 47)."… … …;"*

*Applikati dawn il-principji ghall-offiza taht Kap. 379, din il-qorti taghraf illi l-waqt li l-ligi Maltija (Kap. 379) tikklassifika din l-offiza bhala wahda ta` natura amministrattiva, in-natura tar-reat u n-natura u severità tal-piena taghti bixra totalment diversa lill-offiza, b`mod li ma tistax ma titqiesx bhala wahda ta` natura kriminali. In fatti dan johrog car meta wiehed jezamina l-aspettattivi tal-piena mghotija ghall-offizi taht il-Kap. 379 fid-dawl ta` paragrafu 47 tal-kaz **Bendenoun v. France**:*

i) illi l-Kap. 379 japplika lic-cittadini kollha u mhux lil xi grupp specifiku ;
ii) il-multa m`hijiex intiza ghal kumpens pekunarju ghal dannu soffert, izda kienet essenzjalment piena li tikkostitwixxi deterrent ;
iii) il-multa kienet imposta b`regola generali bi skop punittiv u li jservi ta` deterrent;
iv) illi l-multa kienet wahda ta` entità konsiderevoli.

*Mehuda in konsiderazzjoni dawn l-aspettattivi, din il-qorti ma tistax ma takkoljix l-insenjament tal-ECHR meta kkonkludiet fil-kaz ta` **Bendenoun v. France** :*

"Having weighed the various aspects of the case, the Court notes the predominance of those which have a criminal connotation. None of them is decisive on its own, but taken together and cumulatively they made the `charge` in issue a `criminal` one within the meaning of article 6 § 1 ...," ibid. para. 47.

Illi hija l-fehma konsiderata ta` din il-qorti li l-argument tal-intimati – li ma jistghux jigu applikati kriterja ghat-tfittxija tan-natura inerenti t`offiza skond gurisprudenza Ewropea meta si tratta tal-Kostituzzjoni ta` Malta, kemm-il darba ma tigix applikata fis-shih il-gurispridenza tal-Qorti Ewropea ghall-materja kollha – ma tregix. Dan qieghed jinghad ghaliex il-kriterji stabbiliti ghal kxif ta` natura intrinsika tal-offiza hija wahda [sic] oggettiva u kwazi xjentifika fil-precizjoni taghha. Dana ma jfissirx li din il-qorti ma setghatx tesplora kriterji ohra ugwalment validi ghat-tfittxija tan-natura intrinsika tal-offiza.

Din il-qorti tqis inoltre illi l-proceduri inizjati kontra r-rikorrent taht Kap. 379 m`ghandhomx min-natura ta` drittijiet u obbligi civili izda ghandhom is-sura ta` infurzar minn awtorità governattiva a differenza ta` proceduri mahsuba taht l-artikolu 27A Kap. 379.

Il-qorti tqis ghalhekk illi l-offizi li bihom tinsab mixlija l-assoc- jazzjoni rikorrenti huma offizi ta` natura kriminali u dana kemm ghal dak li jirrigwarda d-dettami tal-artikolu 39(1) tal-Kostituzzjoni ta` Malta, kif ukoll ghar-rekwiziti tal-artikolu 6(1) tal-Konvenzjoni Ewropea kif ratifikata bil-Kap. 319 tal-Ligijiet ta` Malta.

Sar appell.

Il-Qorti Kostituzzjonali qalet hekk *inter alia* :-

21. Dan iwassalna ghall-konsiderazzjoni tat-tieni parti tal-aggravju, viz. jekk il-proceduri dwar ksur tal-ligi tal-kompetizzjoni jitqisux ta` natura kriminali. Dan li sejjer jinghad ighodd strettament ghall-ghanijiet tal-art. 39 tal-Kostituzzjoni aktar

milli ghall-art. 6 tal-Konvenzjoni, partikolarment ghax l-argument tal-Federazzjoni huwa illi l-art. 39 tal-Kostituzzjoni jrid illi decizjoni dwar akkuza kriminali tittiehed minn qorti waqt illi ghall-art. 6 tal-Konvenzjoni huwa bizzejjed illi d-decizjoni, ukoll dwar akkuza kriminali, tittiehed minn "tribunal indipendenti u imparzjali mwaqqaf b`ligi".

22. Naturalment, dan ma jfissirx illi l-gurisprudenza tal-qrati ewropej ma tiswiex bhala ghajnuna ghall-interpretazzjoni tal-ligi domestika, aktar u aktar il-gurisprudenza tal-Qorti tal-Gustizzja tal-Unjoni Ewropea ["il-Qorti tal-Gustizzja"] peress illi l-ligi ewropea tal-kompetizzjoni serviet bhala mudell ghal-ligi taghna, izda tista` tkun relevanti wkoll il-gurisprudenza tal-Qorti Ewropea tad-Drittijiet tal-Bniedem dwar it-tifsira ta` "akkuza kriminali".

*23. Fil-fatt l-Appellanti jistriehu fuq din is-silta mis-sentenza moghtija mill-Court of First Instance fil-15 ta` Marzu 2000 fil-kaz ta` **Cimenterias CBR SA v. il-Kummissjoni** (joint cases T-25-95 u ohrajn) biex isahhu l-argument taghhom illi proceduri quddiem l-awtorità tal-kompetizzjoni ma ghandhomx min-natura ta` proceduri penali:*

*"717. It is settled case-law that the Commission is not a `tribunal` within the meaning of Article 6 of the ECHR (Joined Cases 209/78 to 215/78 and 218/78 **Van Landewyck v. Commission** [1980] ECR 3125, paragraph 81, and **Musique Diffusion Française**, ..., paragraph 7; T-11/89 **Shell v. Commission,** ... paragraph 39). Moreover, Article 15(4) of Regulation N° 17 [illum regolament 23.5 tar-Regolament 1/2003] specifically provides that decisions of the Commission to impose fines for infringement of competition law are not of a criminal law nature (Case T-83/91 **Tetra Pak v. Commision** [1994] ECR II-755, paragraph 235).*

"718. Even though the Commission is not a `tribunal` within the meaning of Article 6 of the ECHR, and even though the fines imposed by the Commission are not of a criminal law nature, the Commission must nevertheless observe the general

*principles of Community law during the administrative procedure (**Musique Diffusion Française v. Commission**, … paragraph 8, and T-11/89 **Shell v. Commission**, … paragraph 39). However, the fact that the Commission both investigates and makes findings of infringements of Article 85 and/or Article 86 of the Treaty does not of itself constitute a breach of a general principle of Community law (Case T-348/94 **Enso Española v. Commission** [1998] ECR ll-1875, paragraph 56). Accordingly, the Court must reject the argument put forward by Aalborg, Asland and Blue Circle that the contested decision is unlawful on the ground that it was adopted under a system in which the Commission carries out both investigatory and decision-making functions";*

*24. Ma huwiex ghalkollox irrelevanti illi l-qorti (kemm fil-kaz ta` **Cimenterias CBR SA** u kemm fil-kaz ta` **Tetra Pak** citat fil-para. 717) hassitha marbuta bit-test ta` dak li llum huwa reg. 23.5 tar-Regolament 1/2003 biex tghid illi l-proceduri quddiem il-Kummissjoni "are not of a criminal law nature" u ghalhekk ma adottatx "tifsira awtonoma" kif, ghar-ragunijiet moghtija fuq, din il-qorti hija marbuta li taghmel meta tigi biex tinterpreta l-Kostituzzjoni.*

*Aktar minn hekk, izda, huwa relevanti dak li qalet il-Qorti tal-Gustizzja fis-sentenza tas-7 ta` Jannar 2004 fil-kaz ta` **Aalborg Portland A/S u ohrajn v. il-Kummissjoni** (joined cases 204/00 u ohrajn), illi l-principju ne bis in idem – principju tad-dritt penali – japplika ghall-proceduri quddiem il-Kummissjoni; kien biss ghax il-fatti ma kinux l-istess, u mhux ghax il-principju ma huwiex applikabbli, li l-qorti sabet li ma kienx hemm ksur tal-principju :*

338 As regards observance of the principle ne bis in idem, the application of that principle is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected. Under that principle, therefore, the same person cannot be sanctioned more than once for a single unlawful course of conduct designed to protect the same legal asset.

339 The Court of First Instance merely pointed out the difference in object between, on the one hand, the supply contracts and the cooperation agreements signed between Calcestruzzi and the three Italian cement producers and, on the other hand, the part of the agreement between those cement producers which sought to prevent imports of cement from Greece by Calcestruzzi. Participation in the Cembureau Agreement on non-transhipment to home markets constitutes the infringement sanctioned by the Cement Decision and the Court of First Instance considered that the Cement Decision had a different object from that pursued by the decision of the Italian competition authority in respect of the supply contracts and the cooperation agreements between Calcestruzzi and the Italian cement producers.

340 As there was no identity in the facts, there was no breach of the principle ne bis in idem.«

25. L-argument illi l-proceduri quddiem il-Kummissjoni taht il ligi tal-kompetizzjoni ewropea ma humiex ta` natura penali jiddghajjef hafna. Ma hemmx ghalfejn jinghad ukoll illi procedura li ma hijiex bi ksur tal-"principji generali tad-dritt komunitarju" mhux bilfors ma hijiex bi ksur tal-Kostituzzjoni.

26. L-Appellanti jistriehu wkoll fuq is-sentenza tal-Qorti Ewropea tad-Drittijiet tal-Bniedem fil-kaz ta` **A Menarini Diagnostics S.R.L. v. Italia** ghax ighidu illi dik is-sentenza "f`paragrafu 57 sa 59 turi caqliq sinjifikanti fil-gurisprudenza kostanti tal-Qorti Ewropea" :

57. La Cour observe que les griefs de la société requérante ont trait au droit d`accéder à un tribunal doté de la plénitude de juridiction et au réexamen judiciaire, prétendument incomplet, de la décision administrative rendue par l`AGCM.

58. En l`espèce, la sanction litigieuse n`a pas été infligée par un juge à l`issue d`une procédure judiciaire contradictoire, mais par l`AGCM. Si confier à des autorités administratives la tâche de

*poursuivre et de réprimer les contraventions n`est pas incompatible avec la Convention, il faut souligner cependant que l`intéressé doit pouvoir saisir de toute décision ainsi prise à son encontre un tribunal offrant les garanties de l`article 6 (**Kadubec v. Slovaquie**, 2 septembre 1998, § 57, **Recueil des arrêts et** décisions 1998-VI, et **Čanády c. Slovaquie**, no 53371/99, § 31, 16 novembre 2004).*

*59. Le respect de l`article 6 de la Convention n`exclut donc pas que dans une procédure de nature administrative, une « peine » soit imposée d`abord par une autorité administrative. Il suppose cependant que la décision d`une autorité administrative ne remplissant pas elle-même les conditions de l`article 6 § 1 subisse le contrôle ultérieur d`un organe judiciaire de pleine juridiction (**Schmautzer, Umlauft, Gradinger, Pramstaller, Palaoro et Pfarrmeier c. Autriche**, arrêts du 23 octobre 1995, série A nos 328 A-C et 329 A-C, respectivement §§ 34, 37, 42 et 39, 41 et 38). Parmi les caractéristiques d`un organe judiciaire de pleine juridiction figure le pouvoir de réformer en tous points, en fait comme en droit, la décision entreprise, rendue par l`organe inférieur. Il doit notamment avoir compétence pour se pencher sur toutes les questions de fait et de droit pertinentes pour le litige dont il se trouve saisi (**Chevrol c. France**, no 49636/99, § 77, CEDH 2003-III, et **Silvester`s Horeca Service c. Belgique**, n° 47650/99, § 27, 4 mars 2004).«*

27. Din is-silta tolqot il-kwistjoni ta` access ghal qorti aktar milli l-kwistjoni tan-natura amministrattiva jew penali tal-proceduri.

*Aktar relevanti ghall-kwistjoni jekk il-proceduri ghandhomx min-natura penali jew le huwa dak li jinghad fl-istess sentenza ta` **Menarini** fil-paragrafi 40 sa 44 :*

40. Quant à la nature de l`infraction, il apparaît que les dispositions dont la violation a été reprochée à la société requérante visaient à préserver la libre concurrence sur le marché.

*La Cour rappelle que l`AGCM, autorité administrative indépendante, a comme but d`exercer une surveillance sur les accords restrictifs de la concurrence ainsi que sur les abus de position dominante. Elle affecte donc les intérêts généraux de la société normalement protégés par le droit pénal (**Stenuit c. France**, … § 62). En outre, il convient de noter que l`amende infligée visait pour l`essentiel à punir pour empêcher la ré- itération des agissements incriminés. On peut dès lors en conclure que l`amende infligée était fondée sur des normes poursuivant un but à la fois préventif et répressif (mutatis mutandis, Jussila, …, § 38).*

*41. Quant à la nature et à la sévérité de la sanction "susceptible d`être infligée" à la requérante (**Ezeh et Connors c. Royaume-Uni** [GC], nos 39665/98 et 40086/98, § 120, CEDH 2003-X), la Cour constate que l`amende en question ne pouvait pas être remplacée par une peine privative de liberté en cas de non-paiement (a contrario, **Anghel c. Roumanie**, n° 28183/03, § 52, 4 octobre 2007). Cependant, elle note que l`AGCM a prononcé en l`espèce une sanction pécuniaire de six millions d`euros, sanction qui présentait un caractère répressif puisqu`elle visait à sanctionner une irrégularité, et préventif, le but poursuivi étant de dissuader la société intéressée de recommencer.*

En outre, la Cour note que la requérante souligne que le caractère punitif de ce type d`infraction ressort aussi de la jurisprudence du Conseil d`Etat.

*42. A la lumière de ce qui précède et compte tenu du montant élevé de l`amende infligée, la Cour estime que la sanction relève, par sa sévérité, de la matière pénale (**Öztürk** …, § 54, et, a contrario, **Inocêncio c. Portugal** (déc.), no 43862/98, CEDH 2001-I).*

… … …

44. Compte tenu des divers aspects de l`affaire, et ayant examiné leur poids respectif, la Cour estime que l`amende infligée à la société requérante a un caractère pénal, de sorte que l`article 6 § 1 trouve à s`appliquer, en l`occurrence, sous son volet pénal.

Partant, il convient de rejeter l`exception soulevée par le Gouvernement quant à l`inapplicabilité ratione materiae de l`article 6 de la Convention.«

28. Il-qorti tqis illi l-ligi maltija tal-kompetizzjoni thares interessi generali tas-socjetà li huwa wkoll il-ghan tal-ligi penali, u f`dan tixbah id-disposizzjonijiet taht it-Titolu VI tat-Taqsima II tal-Ewwel Ktieb tal-Kodici Kriminali: Fuq id-Delitti kontra l-Kummerc Pubbliku; tqis illi l-ligi tal-kompetizzjoni ghandha l-hsieb ukoll li sservi ta` deterrent, bhal-ligi penali; tqis illi l-multa li tista` tinghata mid-Direttur hija x`aktarx harxa u hija mahsuba bhala piena u mhux bhala risarciment ta` danni civili; u tqis illi huwa relevanti wkoll il-fatt illi, qabel l-emendi li saru fil-Kap. 379 bis-sahha tal-Att VI tal-2011, l-"akkordji u prattiki projbiti" taht l-art. 5 bhal dawk li dwarhom hija mixlija l-Federazzjoni fil-kaz tallum kienu meqjusa "reati" taht l-art. 16 tal-istess Kap. 379, b`mod ghalhekk illi, ghalkemm wara l-Att VI tal-2011 dawk l-"akkordji u prattiki projbiti" ma baqghux jitqiesu "reati", is-sustanza taghhom baqghet l-istess. Dawn il-konsiderazzjonijiet iwasslu lill-qorti biex taqbel mal-ewwel qorti illi l-proceduri taht il-ligi tal-kompetizzjoni ghandhom min-natura ta` proceduri dwar akkuza kriminali u ghalhekk ghandhom ikunu mharsa bil-garanziji li l-art. 39 jrid ghal proceduri dwar akkuzi kriminali.

6. <u>Il-Kap 544 tal-Ligijiet ta` Malta</u>

Se ssir referenza ghal dawk id-disposizzjonijiet tal-Att dwar il-Finanzjament tal-Partiti Politici li ghandhom rilevanza fil-kaz tal-lum.

<u>Art 22</u> ighid :-

(1) Il-partiti politici ghandhom jirrapportaw lill-Kummissjoni fir-rigward tal-amministrazzjoni finanzjarja taghhom. Il-Kummissjoni tista` tesigi informazzjoni, fuq inizjattiva taghha stess, dwar l-imsemmija amministrazzjoni finanzjarja skont kif provdut f`dan l-Att.

(2) Partiti politici li jinstabu mill-Kummissjoni li jkunu kisru xi dispozizzjoni ta` dan l-Att ghandhom ikunu soggetti ghal sanzjonijiet :

(a) permezz ta` espozizzjoni biss u osservazzjonijiet negattivi-pubbliku; u, jew

(b) bl-impozizzjoni ta` penali amministrattivi.

Art 24 ighid :-

(1) It-tezorier ta` partit politiku ghandu jhejji prospett annwalital-kontijiet, fir-rigward ta` kull sena finanzjarja, ta` dak il-partit politiku,liema dikjarazzjoni ghandha tinkludi :

(a) dikjarazzjoni ta` dhul u ta` nfiq;

(b) id-dikjarazzjoni tal-pozizzjoni finanzjarja fit-tmiem tas-sena finanzjarja;

(c) id-dikjarazzjoni ta` cash flows; u

(d) in-noti supplimentari kollha u l-iskedi relatati mal-paragrafi (a), (b) u (c):

Izda ghall-finijiet ta` dan is-subartikolu "sena finanzjarja" tfisserdak il-perjodu konsekuttiv ta` tnax-il xahar li jibda mid-data maghzula mill-partit politiku ghall-bidu tas-sena finanzjarja tieghu.

(2) Id-dikjarazzjoni ta` kontijiet taht dan l-artikolu ghandha tikkonforma wkoll ma` dawk il-htigiet fir-rigward tal-forma u l-kontenuttaghha kif ghandu jigi preskritt b`regolamenti maghmulin mill-Ministru,kif rakkomandat mill-Kummissjoni.

(3) Kull membru tal-partit politiku, kandidat, ufficjal ta` partit centrali jew lokali ghandu jipprovdi lit-tezorier tal-partit politiku, l-informazzjoni rilevanti skont id-dispozizzjonijiet rilevanti f`dan l-Att, fi zmien ragonevoli, u fin-nuqqas ta` dan, huwa jkun hati ta` nuqqas amministrattiv punibbli mill-Kummissjoni b`multa

amministrattiva li tammonta bejn mitt euro (€100) u elfejn euro (€2,000) :

Izda jekk xi membru ta` partit politiku, ufficjal ta` partit centrali jew lokali jipprovdi xi informazzjoni falza huwa jehel il-pieni previsti fir-rigward ta` dikjarazzjonijiet foloz skont l-artikolu 188(2) tal-Kodici Kriminali.

Art 37 jistipola :

(1) Kull donazzjoni li taqbez l-ammont ta` hames mitt euro (€500) li tigi mill-istess sors ghandha tigi registrata flimkien mal-ammont tad-donazzjoni, l-isem u l-indirizz tad-donatur, jew id-dettalji tar-registrazzjoni tal-kumpanija, fil-kaz meta d-donatur ikun kumpanija registrata, id-data li fiha d-donazzjoni nghatat u d-data li fiha d-donazzjoni giet accettata u kull dettalji ohra rilevanti :

Izda meta donazzjoni tingabar waqt manifestazzjoni jew xi attività organizzata mill-partit politiku jew mill-kandidat indipendenti u fejn din id-donazzjoni ma taqbizx l-ammont ta`hamsin euro (€50) ma hemmx il-htiega li tali donazzjoni tkun registrata.

(2) Kull donazzjoni li wahedha ma taqbizx l-ammont ta` hames mitt euro (€500) izda li, meta mizjuda ma` xi donazzjonijiet jewbeneficcji ohra mizjuda flimkien lill-partit politiku mill-istess sorsfl-istess sena kalendarja, teccedi l-ammont imsemmi ghandha tigi registrata f`dak il-mument li fih l-imsemmi ammont jintlahaq.

(3) Kull min dolozament, bl-intenzjoni li jahbi l-origini u l-ammonti ta` donazzjonijiet, jaqsam donazzjoni f`ammonti izghar, jew, sabiex jevita r-registrazzjoni u l-htigiet ta` rappurtar stipulatif`dan l-Att ikun hati ta` reat u jehel multa amministrattiva li ma taqbizx l-ghaxart elef euro (€10,000).

(4) Il-Kummissjoni ghandha, fejn jidhrilha li hu mehtieg ghall-infurzar xieraq tad-dispozizzjonijiet

ta` dan l-Att u bla hsara ghall-obbligu taghha li tagixxi b`mod proporzjonat, is-setgha li tinvestigau titlob sabiex tigi provduta bl-informazzjoni kollha li tista` tehtieg minn xi partit politiku, individwu, persuna guridika, korp, inkluz xi istituzzjoni finanzjarja u, jew xi fornitur ta` servizz tat-telekomunikazzjoni, li jistghu jkunu fil-pussess ta` informazzjoni bhal din sabiex jigi stabbilit is-sors ta` kull donazzjoni ricevuta mill-partit politiku:

Izda l-partiti politici ma ghandhomx ikunu obbligati li jizvelaw lill-Kummissjoni s-sors ta` kull donazzjoni ta` mhux aktarminn hames mitt euro (€500) moghtija lilhom b`mod kunfidenzjali sakemm il-Kummissjoni ma tipprovdix prova li hemm bazi ragonevoli biex wiehed jemmen li l-ammont attwalment moghti b`mod kunfidenzjali fil-perjodu ta` sena mill-istess sors jaqbez is-somma ta` hames mitt euro (€500).

(5) Kandidat indipendenti ghandu josserva d-dispozizzjonijiet tas-subartikoli (1), (2), (3) u (4).

L-**Art 44(1)** jaghti setgha lill-Ministru biex bi qbil mal-Kummissjoni Elettorali jaghmel regolamenti ghall-ahjar twettiq tad-dispozizzjonijiet ta` dan l-Att.

Fost ohrajn, jistghu jsiru regolamenti :-

(c) biex jipprovdi ghall-procedura ghall-impozizzjoni ta` multi u sanzjonijiet amministrattivi, ghall-procedura tal-ezercizzju ta` drittijiet ta` appell fir-rigward ta` dawn il-multi u sanzjonijiet lill-qrati ta` gurisdizzjoni civili u ghall-kondizzjonijiet li tahthom dawk il-multi u sanzjonijiet ghandhom isiru titolu ezekuttiv skont id-dispozizzjonijiet tal-Kodici ta` Organizzazzjoni u Procedura Civili jew ta` xi ligi ohra fis-sehh minn zmien ghal zmien :

Izda ebda multa amministrattiva jew sanzjonijiet ohra prevista fir-regolamenti maghmula taht dan l-Att ma ghandha tammonta ghal aktar minn hamsin elf euro (€50,000) fir-rigward ta` kull reat, ghal aktar minn hamest elef euro (€5,000)

ghal kull gurnata li matulha jkompli r-reat jew ghas-sospensjoni ta` kull ufficjal ta` partit politiku ghal perjodu ta` aktar minn hames snin.

7. Konsiderazzjonijiet ta` din il-Qorti

Martin Kuijer (op. cit.) josserva illi :-

The doors of the 'Walhalla' of Article 6 ECHR remain firmly shut in some categories of proceedings. In those instances the protection offered by the Convention concerning judicial independence and impartiality is a priori excluded.

Fil-kaz tal-lum, il-vertenza hija relatata mal-isfera politika u ghalhekk taqa` fost il-kazi li mhux meqjusa li jirrelataw mad-determinazzjoni ta` drittijiet jew obbligi civili.

Mhux l-istess jista` jinghad dwar jekk il-kwistjoni tinkwadrax fl-ambitu ta` akkuza kriminali.

Il-Qorti tqis li l-ligi kienet mahsuba sabiex isservi ta` deterrent. Tant hu hekk li ghal xi sitwazzjonijiet kontemplati mil-ligi stess, il-multa hija qawwija u ntiza li tkun piena.

Din il-Qorti hija konxja tal-fatt li fil-ligi l-multi huma deskritti bhala amministrattivi.

Hija konxja wkoll illi waqt id-dibattitu dwar l-abbozz (li wara sar ligi) fil-Kamra tad-Deputati, inghad li l-multi komminati huma amministrattivi.

Infatti fil-21 ta` Lulju 2014, il-Ministru Onor. Owen Bonnici ighid –

"*…… Ghafasna biex l-infurzar ikun wiehed permezz ta` administrative fines aktar milli reati kriminali. Hawnhekk irrid naghmel parentesi. Dikjarazzjoni falza hija reat kriminali li johrog mill-Kodici Kriminali. F`dan l-Abbozz ta` Ligi hawn konsegwenzi kriminali ghal min ma jobdix dan l-istess Abbozz ta` Ligi imma l-konsegwenzi mhux gejjin minnu imma gejjin ghax ikun qed iwettaq reat taht il-Kodici Kriminali. Fejn hemm reati li ma johorgux mill-Kodici, dan l-Abbozz ta` Ligi qed jitkellem dwar pieni*

amministrattivi li huma gholjin, €10,000 multa ecc., imma fl-istess hin dehrilna li peress li l-partiti jahdmu bil-volontarjat, ma rridux nigu f`sitwazzjoni fejn kulhadd jitwerwer milli jsir tezorier ta` partit. Ridna noholqu bilanc li nahseb hloqnieh tajjeb hafna."

Issa l-fatt illi l-multi mahsuba fil-ligi kienu deskritti bhala multi amministrattivi ma jxejjen xejn minn mohh din il-Qorti li dawk il-multi kienu fil-fatt ta` natura penali, tenut kont tas-severita` taghhom.

Din il-Qorti taghraf illi ghalkemm il-Kap 544 jikklassifika l-offiza bhala ta` natura amministrattiva, fir-realta` n-natura tal-offiza, kif ukoll is-severità tal-piena, jaghtu lill-offiza xejra ghal kollox diversa mill-klassifikazzjoni ndikata fil-ligi, b`mod li l-offiza ghandha titqies ta` natura kriminali.

Din il-Qorti lanqas ma hija tal-fehma li l-fatt li l-imposizzjoni ta` dawn il-multi ma jidhrux fuq il-kondotta jew il-fedina penali, kif ukoll li ma tistax tigi nflitta sentenza ta` prigunerija jew li l-multa ma tistax tigi konvertita fi zmien ta` prigunerija, allura dak ifisser li l-multi mhumiex ta` natura penali.

Fuq l-iskorta tal-gurisprudenza fuq citata, jirrizulta li fil-fatt il-multa ghandha xejra penali.

Tajjeb jinghad ukoll illi l-ligi hija ta` interess pubbliku.

Din il-konsiderazzjoni kienet ribadita fil-kors tad-dibattitu dwar l-abbozz tal-ligi fil-Kamra tad-Deputati :-

<u>Seduta tal-21 ta` Lulju 2014</u> :
Ministru Onor. Dr. Owen Bonnici :

Irrid nghid li l-Gvern implimenta trilogija ta` ligijiet li ghandhom l-ghan li jtejbu l-mod ta` kif naghmlu l-politika f`pajjizna…. Fil-fatt dan huwa t-tielet Abbozz ta` Ligi minn sensiela ta` tliet ligijiet li ghandhom l-ghan li jzidu t-trasparenza fil-politika….. Ahna jidhrilna li din il-ligi hija prijorità ghaliex irridu naghmlu dak kollu mehtieg biex il-partiti politici jkunu aktar kredibbli fl-operat taghhom u kontabbli mal-membri u s-socjetà ingenerali. Dan huwa l-qofol ta` dan l-Abbozz ta` Ligi. L-ghan ta` dan l-Abbozz ta` Ligi, jekk ikollok taghsru u taghmel sommarju tieghu, jista` jingabar f`kelma wahda; li l-partiti jsiru atar kredibbli u kontabbli, kemm mal-membri

taghhom stess u aktar u aktar mas-socjetà ingenerali. .....il-partiti politici huma fundamentali fil-mod kif tithaddem il-politika f`kull demokrazija. Jekk il-politika kellha tkun pajjiz, il-partiti politici jkunu l-belt kapitali ta` dak il-pajjiz! Il-partiti huma l-qofol tas-sistema demokratika! ...L-iskop ta` din il-ligi huwa li tohloq parametri, regolamenti u strutturi li ghandhom l-ghan li jkomplu jsahhu lill-partiti politici f`pajjizna mhux biss ghaliex issa hemm il-ligi li tirregolahom imma biex inkomplu nsahhuhom halli l-poplu jkun cert li m`hemmx sitwazzjoni ta` laissez-faire jew free for all.

Seduta tal-21 ta` Lulju 2014 :
Onor. Dr. Chris Said :

Ahna naqblu wkoll li l-partiti politici jehtieg li jigu regolati u skrutinizzati b`ligijiet serji u effettivi ghax b`dan il-mod biss tkun assigurata trasparenza fl-operat tal-partiti politici. Il-poplu jrid u jistenna trasparenza minn min jirrapprezentah u ghalhekk il-politiku jrid imexxi bl-ezempju. Inutli l-politiku jitkellem dwar trasparenza imma mbaghad ma jkunx hemm qafas regolatorju li jirregola l-operat tieghu u tal-partit politiku li hu jirrapprezenta.

Seduta tad-29 ta` Ottubru 2014 :
Onor. Dr. Stefan Buontempo :

Sur President, jien nemmen li r-restrizzjonijiet u l-obbligi l-godda imposti fuq il-partiti politici permezz ta` dan l-Abbozz ta` Ligi se jwasslu sabiex flimkien inkomplu nsahhu l-fiducja li l-poplu ghandu fina, filwaqt li nkomplu nibnu pedamenti demokratici aktar sodi.

Seduta tal-4 ta` Novembru 2014 :
Ministru Onor. Evarist Bartolo :

Huwa importanti hafna ghat-thaddim tad-demokrazija li c-cittadini jkunu jafu min qed jiffinanzja lill-partiti politici. Huwa essenzjali li jkun hemm trasparenza f`dak li ghandu x`jaqsam mal-finanzjament tal-partiti politici ghax ic-cittadini jridu jkunu jafu jekk il-politici humiex qeghdin hemm biex iservu lic-cittadini, li wara kollox ghandhom id-dritt tal-vot u li mad-dritt tal-vot ghandhom ukoll id-dmir li jhallsu t-taxxi li permezz taghhom il-gvern ikun jista` jmexxi. Ic-cittadini ghandhom dritt ikunu jafu jekk il-politici humiex qeghdin hemm biex iservu lic-cittadini jew inkella biex jaqdu lin-nies tal-flus, li juzaw l-ghoti ta` flus lill-partiti politici biex jixtru l-policies. Meta tixtri influwenza go partit politiku inti tkun qed taghmel dan biex jekk jista` jkun il-policies li jiehu dak il-partit li jkun fil-gvern jew li jkun qed jahdem biex ikun fil-gvern ikun jista` jiehu decizjonijiet li jmorru fl-interess tan-nies tal-flus. Ghalhekk huwa importanti hafna li c-cittadini jkunu jafu mnejn ikunu gejjin il-fondi biex jiffinanzjaw lilhom infushom.

In vista tal-premess, u ghar-ragunijiet indikati, il-Qorti qeghda <u>tichad</u> l-ewwel eccezzjoni preliminari tal-Avukat Generali.

IV. <u>It-tieni (2) eccezzjoni tal-Avukat Generali</u>

Skont l-Avukat Generali, l-azzjoni tar-rikorrenti hija ntempestiva u prematura ghaliex il-proceduri quddiem il-Kummissjoni Elettorali mhumiex konkluzi. Sabiex tasal ghall-fehma li kien hemm ksur tal-jedd ghal smigh xieraq, irid isir apprezzament tal-process kollu mhux jitqies biss bicca minnu.

Dwar l-eccezzjoni tal-intempestivita`, il-Qrati taghna esprimew ruhhom fis-sens illi ghalkemm huwa minnu li l-harsien tad-dritt ta` smigh xieraq jista` jigi evalwat fil-kuntest tal-proceduri kollha u ghalhekk ikun prematur li wiehed jiddeciedi fi stadju bikri tal-process, meta diga` jkun hemm ragunijiet bizzejjed li fuqhom il-Qorti tkun tista` ssib li hemm lezjoni, m`ghandhiex toqghod tistenna sakemm jintemm il-kaz kollu jew tistenna li attwalment jikser il-jedd biex tiddeciedi jekk hemmx lezjoni jew le. Dan ghaliex jista` jaghti l-kaz li jkun tard wisq jew li l-persuna tibqa` minghajr rimedju.

Fis-sentenza li tat fil-25 ta` Marzu 2011 fil-kawza fl-ismijiet **<u>David sive David Norbert Schembri vs Avukat Generali</u>**, il-Qorti Kostituzzjonali ghamlet referenza ghal dak li qalet l-Ewwel Qoorti meta din sostniet illi :-

> *"kellha tqis il-process kollu, u mhux episodju wiehed mehud wahdu. Ghalkemm dwar id-decizjoni fuq jekk ir-rikorrent ghandux jigi msejjah biex iwiegeb ghall-akkuza ma hemmx rimedju ordinarju iehor, ghax dik id-decizjoni hija finali, dwar id-decizjoni fuq l-akkuza nfisha il-process ordinarju ghadu ghaddej, u ghalhekk ir-rikorrent ghadu jista` jinqeda bir-rimedji li taghtih il-ligi ordinarja. Dan huwa relevanti ghax il-jedd imhares taht l-Artikolu 6 huwa dwar id-decizjoni fuq l-akkuza kriminali, u mhux dwar id-decizjoni fuq jekk ir-rikorrent ghandux jigi msejjah biex iwiegeb ghall-akkuza.*
>
> *Fil-kaz tal-lum id-decizjoni illi l-kawza kriminali kontra r-rikorrent ghandha titmexxa `l quddiem, fiha nfisha u wehedha, ma tolqot ebda jedd*

fondamentali mhares taht l-artikolu tal-Konvenzjoni li fuqu qieghed jistrieh ir-rikorrent".

Il-Qorti Kostituzzjonali osservat illi l-appellant ma kienx qabel mal-Ewwel Qorti dwar il-kwistjoni illi kellu jitqies il-process kollu u mhux episodju wiehed.

L-appellant ghamel l-argument illi :-

" … l-ghoti ta` rimedju jista` jigi anticipat jekk ikun se jinkiser dritt. Fis-sentenza tal-Qorti ta` Strasbourg fil-kaz fl-ismijiet ***Imbroscia v. Switzerland*** *jinghad li :*

`The manner in which article 6(1) and 3(c) is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case. In order to determine whether the aim of Article 6 – a fair trial – has been achieved, regard must be had to the entirety of the domestic proceedings conducted in the case.`

*Kif tikteb Karen Reid fil-ktieb "****A Practitioner`s Guide to the European Convention on Human Rights****", 3 rd Edition page 70*

"While the conformity of a trial with the requirements of Article 6 must be assessed on the basis of the trial as a whole, a particular incident may assume such importance as to constitute a decisive factor in the general appraisal of the trial overall".

Minkejja dan l-argument, l-aggravju kien michud u l-Qorti Kostituzzjonali kkonfermat dak li kien deciz mill-Ewwel Qorti.

Fid-decizjoni li tat fit-22 ta` Frar 2013 dwar Referenza li kienet saret mill-Qorti Kriminali fil-kawza **Repubblika ta` Malta vs Carmel Camilleri** il-Qorti Kostituzzjonali osservat illi mhuwiex necessarjament il-kaz illi l-Ewwel Qorti tistenna sakemm jintemm il-process kriminali qabel ma tqis ilment dwar ksur tal-jedd ghal smigh xieraq sabiex dak il-jedd jigi "evalwat fir-rigward tat-totalità tal-procedura", kif pretiz mill-Avukat Generali.

Inghad illi :-:

> *"Tassew illi l-gurisprudenza generalment hija kif ighid l-Avukat Generali. Ukoll fil-kaz ta` **Imbrioscia v. l-Isvizzera** (Q.E.D.B. 24 ta` Novembru 1993, rikors 13972/88.4), li wkoll kien dwar id-dritt ghall-ghajnuna ta` avukat waqt l-interrogazzjoni, il-Qorti Ewropeja qalet illi kellha taghmel "a scrutiny of the proceedings as a whole" . Dan huwa principju generali li japplika ghall-jedd ghal smigh xieraq u ma jidhirx li hemm xi raguni ghala filkuntest tal-jedd ghall-ghajnuna ta` avukat ghandu jkun differenti.*
>
> *Madankollu, kif qalet din il-qorti fil-kaz ta` **Il-Pulizija v. Alvin Privitera** (Q. Kost. 11 ta` April 2011) , jista` jigri illi episodju wiehed ikun determinanti ghall-ezitu tal-process kollu u ghalhekk ma jkunx il-kaz illi l-qorti tistenna sakemm jintemm il-kaz. Dan jista` facilment jigri fil-kaz ta` ammissjoni ta` htija. Huwa minnu illi, jekk ikollha raguni ghax tahseb illi dik l-ammissjoni ma jkollhiex mis-sewwa, il-qorti tista` ma toqghodx fuqha. Ma jistax ma jinghadx, izda, illi stqarrija ta` htija aktar iva milli le tkun determinanti.*
>
> *Din il-qorti ghalhekk ma tarax illi hemm ragunijiet bizzejjed biex tiddisturba din il-konkluzjoni li waslet ghaliha l-Ewwel Qorti, u li wasslitha biex taghti decizjoni qabel ma jkun intemm il-process penali.*
>
> *Barra minn hekk, dan il-kaz inbeda b`referenza mill-Qorti Kriminali, li waqqfet is-smigh quddiemha sakemm ikollha t-twegiba ghal dik ir-referenza. Ma setghetx ghalhekk l-Ewwel Qorti ma twegibx ghar-referenza billi tistenna sakemm jinghalaq il-process kriminali.*
>
> *Safejn irid illi l-qorti tqis it-"totalità tal-procedura" qabel ma twiegeb ghar-referenza, l-aggravju huwa ghalhekk michud."*

Fid-decizjoni li tat fis-26 ta` April 2013 fir-Referenza li kienet saret mill-Qorti tal-Magistrati (Malta) bhala Qorti ta` Gudikatura Kriminali fil-kawza **Il-Pulizija vs Dr Melvyn Mifsud**, il-Qorti Kostituzzjonali osservat illi hija l-gurisprudenza kostanti taghha u tal-ECHR illi l-ezami dwar ikunx hemm vjolazzjoni tad-dritt ghal smiegh xieraq irid isir billi jittiehed qies tal-procedimenti kollha fl-assjem taghhom u li ghalhekk dan l-ezercizzju, fil-principju, huwa ndikat li jsir biss fi tmiem il-procedimenti u mhux qabel.

Il-Qorti rrilevat hekk :-

> *"Dan hu ugwalment applikabbli meta din il-Qorti jkollha tikkunsidra jekk x`aktarx tkunx ser issehh tali vjolazzjoni. Huwa minnu li kemm din il-Qorti kif ukoll l-organi ta` Strasburgu kkoncedew li in linea eccezzjonali xi fattur partikolari tal-proceduri jista` jkun tant determinanti ghad-dritt ghal smigh xieraq li ma jkunx mehtieg li l-Qorti tistenna sa tmiem il-proceduri sabiex tiddeciedi jkunx hemm vjolazzjoni tad-dritt in kwistjoni (Ara inter alia **Repubblika ta` Malta v. Carmel Camilleri**, ibid) izda dan ma hux il-kaz li ghandha l-Qorti quddiemha llum.*
>
> *Fil-kaz tal-lum anki kieku kien minnu li naqsu xi notamenti bil-miktub li kienu xi darba jifformaw parti mill-atti - haga li, kif inghad, ma tirrizultax pruvata f`dawn il-proceduri mill-appellant fil-grad li trid il-ligi - il-Qorti ta` kompetenza kriminali tkun ghad trid tevalwa r-relevanza ta` dik il-kitba allegatament nieqsa tenut kont tal-fatt li l-appellant jallega li jehtieg dik il-prova sabiex isostni l-eccezzjoni tieghu tal-preskrizzjoni filwaqt li l-prosekuzzjoni ssostni li r-reat li bih huwa akkuzat l-appellant huwa wiehed ta` natura permanenti u li bhala konsegwenza jgib mieghu il-fatt li t-terminu preskrittiv anqas biss jibda jiddekorri sakemm jibqa` jissusisti l-fatt projbit mil-ligi u cioe` fil-kaz de quo n-nuqqas tal-pagament tal-ammonti allegatament dovuti lill-avukat Dr. Carmelo Grima; il-Qorti riferenti jista` jehtigilha tipprovdi jekk ghandhiex tammetti xi prova sekondarja in sostituzzjoni ta` xi prova primarja u tkun ghad trid tiddetermina jekk il-prosekuzzjoni intentax l-azzjoni penali fiz-zmien previst mil-ligi u jekk tkunx ippruvat il-htija tal-akkuzat sal-grad previst mil-ligi penali u cioe` oltre d-dubbju ragjonevoli; u*

eventwalment, fid-dawl ta` dan kollu, tkun trid tiddeciedi dwar il-htija o meno tal-appellant.

Ikunx hemm vjolazzjoni tad-dritt ghal smigh xieraq, ghalhekk, jiddependi minn kif il-Qorti riferenti tittratta u tiddisponi mid-diversi kwistjonijiet u tappi processwali appena elenkati, fost ohrajn, li jistghu jitqieghdu quddiemha fil-kors tal-process u ghalhekk certament il-fatt wahdu previst mill-appellant sabiex fuqu jsostni t-talba tieghu ghal riferenza lil din il-Qorti ma hux wahdu determinanti tal-kwistjoni minnu sollevata li ghalhekk hi ghal kollox intempestiva u prematura u daqstant intempestiva u prematura hi r-referenza tal-Qorti referenti."

Fid-decizjoni li tat fis-16 ta` Marzu 2011 fil-kawza **Morgan Ehi Egbomon vs Avukat Generali** il-Qorti Kostituzzjonali accettat dak li kienet qalet l-Ewwel Qorti illi sabiex il-qorti tkun tista` tiddeciedi dwar allegazzjoni ta` nuqqas ta` smigh xieraq hemm bzonn illi jsir apprezzament tal-process kriminali kollu. Ladarba f`dak il-kaz il-process kriminali kien ghadu mhux mitmum, kien ghadu mhux maghruf kif u taht liema cirkostanzi jistghu joperaw ir-regoli illi l-appellant qieghed jilmenta dwarhom.

Inghad :

"Ghalhekk, sewwa qalet l-ewwel qorti illi, qabel ma jkun sar u ntemm il-process penali, ikun prematur illi jsir minn din il-qorti l-ezercizzju li jrid l-Appellant, kemm ghax l-Appellant ghad ghandu ghad-dispozizzjoni tieghu r-rimedji u l-mezzi ta` harsien kollha li jaghtih il-process penali – u ghalhekk ghad ghandu rimedji taht il-ligi ordinarja – u kif ukoll ghax din il-qorti ghadha ma tistax tqis il-process penali kollu kemm hu – ghax ghadu ma sarx – biex tkun tista` tghid kienx hemm ksur tal-jeddijiet fondamentali, mhux f`episodju izolat, izda fil-kuntest tal-process meqjus kollu kemm hu u bl-applikazzjoni in concreto tad-dispozizzjoniiet tal-ligi attakkati."

Fil-Pag 140-141 tal-ktieb : **A Commentary on the Constitution of Malta** : **Tonio Borg** ighid :-

The trial or proceedngs had to be seen as a whole and one incident or irregularity does not necessarily vitiate the entire proceedings. (See ***Anthony Zarb et vs Minister for Justice*** *(CC) (16 October 2002) (729/99): "For the question to be decided whether a fair hearing took place or not, according to the previously mentioned articles of the Constitution, one cannot and should not simply focus one`s attention on a part only of the proceedings before a court and if one finds any shortcoming, whatever it may be, one comes to the inexorable conclusion that the entire proceedings are therefore vitiated. On the other hand, for one to arrive at the conclusion whether there was a breach of the fundamental right of a fair hearing, it is necessary that the entire iter of the judicial proceedings be analysed. The assessment has to be based on the entirety of all the elements which form the judicial proceedings since it is only through such a comprehensive assessment that one can reasonably decide whether there was any violation of the said fundamental right" (see also* ***Dr L Pullicino vs Prime Minister et*** *(CC) (18 August 1998) (kollezzjoni Vol LXXII.1.159) where though some irregularities in the jury trial had occurred, the trial as a whole had been fair; see also* ***Josephine Calleja vs Attorney General et*** *(465/94) and* ***Gregorio Scicluna vs Attorney General et*** *(463/94) (both decided by the (CC) on 15 October 2003). See also* ***Victor Lanzon et noe vs Commissioner of Police*** *(CC) (29 November 2004) (15/02) where the interview by Police of a minor in absence of lawyer was not by itself deemed to be in breach of Article 6. See also* ***Police vs Carmelo Ellul Sullivan et*** *(CC) (25 September 2015) (29/10) where the fact that a new magistrate had been appointed who had not heard the witnesses viva voce was not per se considered to be in breach of Article 6 because the trial had not yet been concluded, and the defence would have the right to cross-examine the witnesses before the new magistrate, and the trial had to be seen as a whole; and* ***George Pace v Attorney General et*** *(CC) (31 October 2014) (56/11): "The right to a fair hearing is granted so that after a hearing within a reasonable time, a person who is innocent is not given a guilty verdict, and such person is given all the necessary means for such purpose; and also so*

that guilty persons do not evade the consequences of their actions."

(ara wkoll : **Malcolm Said vs Avukat Generali et** : 24 ta` Gunju 2016)

Fid-decizjoni li tat fis-7 ta` April 2003 fil-kawza **Glenn Bedingfield vs Kummissarju tal-Pulizija et** il-Qorti Kostituzzjonali fissret il-kliem : "*x` aktarx ser jigi miksur*" :

"Kwantu ghat-tieni aggravju, huwa veru li s-subartikolu (1) ta` l-Artikolu 4 tal-Kap. 319 jitkellem dwar allegazzjoni ta` dak li jkun li xi dritt fondamentali tieghu "x`aktarx ser jigi miksur", izda din l-espressjoni qatt ma giet interpretata, sia fil-kuntest ta` l-imsemmi Artikolu 4 u sia fil-kuntest tad-disposizzjoni analoga fil-Kostituzzjoni, li l-Prim Awla (fil-gurisdizzjoni kostituzzjonali taghha) jew din il-Qorti ghandhom jiddeciedu kwistjonijiet jew fl-astratt jew flipotesi li tavvera ruhha xi kontingenza partikolari. Biex wiehed jista` jallega li "x`aktarx ser jigi miksur" xi dritt fondamentali il-fatti jridu jkunu tali li jistghu jwasslu ragjonevolment ghal stat ta` fatt determinat, liema stat ta` fatt ikun jikkozza ma xi wiehed jew aktar mid-drittijiet fondamentali tal-bniedem."

(ara wkoll : QK : 30 ta` Mejju 2003 : **Joseph Hili maghruf bhala Nadia Hili vs Avukat Generali et**)

Fid-decizjoni li tat fit-12 ta` Frar 2016 fil-kawza fl-ismijiet **General Workers` Union vs L-Avukat Generali**, il-Qorti Kostituzzjonali qalet illi :-:

*"Dwar jekk l-azzjoni hijiex intempestiva l-Avukat Generali jilmenta li l-ewwel Qorti kienet zbaljata meta ma ikkonsidratx li f`kuntest ta` allegata lezjoni tad-dritt ghal smigh xieraq l-azzjoni ttentata mill-union hija wahda intempestiva peress li l-proceduri li minnhom qed tilmenta l-istess Union (**GWU v. l-Enemalta Corporation** – fuq tilwima tax-xoghol dwar allegazzjoni ta` ksur ta` ftehim li kien iffirmat bejn il-partijiet fis-sena 2002 fir-rigward ta` Stephen Leonardi, membru tal-union,) ghadhom pendenti.*

L-Avukat Generali jargumenta li stharrig dwar allegazzjoni ta` ksur tad-dritt tas-smigh xieraq jitlob li l-evalwazzjoni tal-procedura li minnha jkun qed isir lament titqies fit-totalita` taghha.

Jghid li huwa inkoncepibbli li f`dan l-istadju ssir l-evalwazzjoni necessarja tal-garanziji kostituzzjonali u konvenzjonali peress li tali evalwazzjoni tista` ssir biss meta l-process ikun mitmum ladarba l-evalwazzjoni trid issir b`riferenza ghall-process fl-intier tieghu … Waqt illi taht il-Konvenzjoni l-Qorti Ewropea tad-Drittijiet tal-Bniedem ma ghandhiex is-setgha illi tqis allegazzjoni dwar ksur ta` drittijiet fondamentali qabel ma min iressaq l-ilment ikun inqeda bir-rimedji domestici kollha, taht il-Kostituzzjoni u taht l-Att dwar il-Konvenzjoni Ewropea il-Prim`Awla tal-Qorti Civili "tista`, jekk tqis li jkun desderabbli li hekk taghmel, tirrifjuta li tezercita s-setghat taghha ... f`kull kaz meta tkun sodifatta li mezzi xierqa ta` rimedju ghall-ksur allegat huma jew kienu disponibbli ... skont xi ligi ohra".

Huwa ghalhekk imholli fid-diskrezzjoni tal-Prim`Awla – dejjem fil-parametri stabbiliti filgurisprudenza – li taghzel "li tezercita s-setghat taghha" wkoll meta min iressaq l-ilment ikollu jew kellu mezzi ohra ta` rimedju, u meta l-Prim`Awla taghzel li tinqeda bis-setghat kostituzzjonali taghha l-Qorti Kostituzzjonali bhala regola ma tiddisturbax dik l-ghazla hlief meta tkun manifestament hazina jew meta hekk ikun mehtieg biex il-proceduri kostituzzjonali ma jigux trivalizzati.

Din il-Qorti tapprezza illi jkun ta` ostakolu ghall-efficjenza tal-gustizzja u tal-amministrazzjoni pubblika jekk, malli titressaq kawza b`allegazzjoni li l-process quddiem tribunal jew korp imwaqqaf b`ligi huwa bi ksur tal-jedd ghal smigh xieraq, dak it-tribunal jew korp ma jkunx jista` jibda jwettaq id-dmirijiet tieghu qabel tinqata` dik il-kawza jekk il-Prim`Awla wisq facilment taghzel li tinqeda bis-setghat kostituzzjonali taghha flok tistenna li jintemmu l-proceduri quddiem dak it-tribunal jew korp biex tqis il-process fl-intier tieghu.

Madankollu, il-Qorti tifhem ukoll illi fic-cirkostanzi tal-kaz tal-lum ikun aktar xieraq illi l-aggravju dwar rimedju ordinarju ma jintlaqax, u illi l-appell jinstema` wkoll fil-meritu, partikolarment billi d-difett allegat fl-istruttura tat-Tribunal jibqa` jipperdura jkun xi jkun lezitu tal-proceduri quddiem it-Tribunal u wkoll ghax ma jkunx ghaqli illi jitkompla process meta hemm sentenza ta` qorti ta` gurisdizzjoni kostituzzjonali li tghid illi dak il-process huwa bi ksur ta` jeddijiet fondamentali. Dan l-aggravju huwa ghalhekk michud."

Fil-kaz ta` **Dimech v. Malta**, li kien deciz mill-ECHR fit-2 ta` April 2015, il-Gvern Malti kien ghamel l-argument illi l-ilment kien prematur billi qal :-

*The Government submitted that the applicant`s complaint was premature as the trial by jury had not yet taken place. It was thus possible that the applicant would not be found guilty, in which case he could not be considered a victim in terms of the Convention (they referred to **Bouglame v. Belgium** (dec.), no. 16147/08, 2 March 2010). The Government contended that examining the applicant`s complaint at this stage would not enable the Court to assess the basis of the applicant`s "conviction", which had not yet taken place. The Government further noted that the constitutional jurisdictions had not "opted" to take cognisance of the case, but simply could not decline the exercise of jurisdiction given that the applicant`s referral request had been accepted by the Criminal Court.*

L-ECHR accettat it-tezi tal-Gvern Malti :-

The Court accepts the Government`s argument that the constitutional jurisdictions had no choice but to take cognisance of the case according to the functioning of the domestic system. However, the Court notes that those jurisdictions did not take cognisance of the case only to find later that the claim was inadmissible. In fact, the constitutional jurisdictions did not reject the case as being premature despite the fact that the proceedings were still pending. Nor did they reject it for

nonexhaustion of ordinary remedies on the ground that the applicant had not asked for a lawyer (admittedly, as established in domestic case-law (see paragraph 31 above), there would have been little point in so doing given the inexistence of such a right in Maltese law at the time). On the contrary, the constitutional jurisdictions took cognisance of the case, opting to examine it on the merits and give judgment accordingly.

The Court notes that according to its constant case-law the question whether or not court proceedings satisfy the requirements of Article 6 § 1 of the Convention can only be determined by examining the proceedings as a whole, that is, once they have been concluded. However, the Convention organs have also held that it is not impossible that a particular procedural element could be so decisive that the fairness of the proceedings could be determined at an earlier stage (see, inter alia, ***X. v. Norway****, Commission decision of 4 July 1978, Decisions and Reports (DR) 14, p. 228;* ***Bricmont v. Belgium****, 7 July 1989, Series A no. 158;* ***Papadopoulos v. Greece****, (dec.), no. 52848/99, 29 November 2001;* ***Arrigo and Vella v. Malta*** *(dec.), no. 6569/04, 10 May 2005 and* ***Pace v. Malta*** *(dec.), no. 30651/03, 8 December 2005). At the same time, the Convention organs have also consistently held that such an issue can only be determined by examining the proceedings as a whole, save where an event or particular aspect may have been so significant or important that it amounts to a decisive factor for the overall assessment of the proceedings as a whole – pointing out, however, that even in those cases it is on the basis of the proceedings as a whole that a ruling should be made as to whether there has been a fair hearing of the case (see, inter alia,* ***X v. Switzerland****, no. 9000/80, Commission decision of 11 March 1982, DR 28, p. 127;* ***B v. Belgium****, Commission decision of 3 October 1990, DR 66, p. 105;* ***Cervero Carillo v. Spain****, (dec.), no. 55788/00, 17 May 2001;* ***Mitterrand v. France*** *(dec.) no. 39344/04, 7 November 2006 and more recently,* ***De Villepin v. France*** *(dec.), no. 63249/09, 21 September 2010).*

*The Court observes that it has found a number of violations of the provisions at issue, in different jurisdictions, arising from the fact that an applicant did not have legal assistance while in police custody because it was not possible under the law then in force (see, for example, **Salduz**, cited above, § 56; **Navone and Others v. Monaco**, nos. 62880/11, 62892/11 and 62899/11, §§ 81-85, 24 October 2013; **Brusco v. France**, no. 1466/07, § 54, 14 October 2010; and **Stojkovic v. France and Belgium**, no. 25303/08, §§ 51-57, 27 October 2011). A systemic restriction of this kind, based on the relevant statutory provisions, was sufficient in itself for the Court to find a violation of Article 6 (see, for example, **Dayanan v. Turkey**, no. 7377/03 §§ 31-33, 13 October 2009; **Yeşilkaya v. Turkey**, no. 59780/00, 8 December 2009; and **Fazli Kaya v. Turkey**, no. 24820/05, 17 September 2013). The same situation appears to obtain in the present case.*

45. Nevertheless, unlike in the above mentioned examples, the criminal proceedings in the present case have not come to an end. Thus, despite the peculiar interpretation of the Court`s case-law by the Constitutional Court, and although it may be unlikely, it cannot be entirely excluded that the courts of criminal jurisdiction, before which the case is heard, hear the case in the same circumstances that would have existed had the right to legalassistance during pre-trial stage not been disregarded, namely by expunging from the records the relevant statements. The Court notes that, if, because of the limitations of the applicable criminal procedural law, it is not possible given the stage reached in the pending proceedings, to expunge from the records the relevant statements (whether at the request of the applicant or by the courts of criminal jurisdiction of their own motion), it cannot be excluded that the legislature take action to ensure that a procedure is made available at the earliest opportunity for this purpose.

Furthermore, even assuming that the above scenario would not come to be, the Court considers that it cannot be excluded that the applicant be eventually acquitted or that proceedings be discontinued.

The Court observes that applications concerning the same subject matter as that at issue in the present case were rejected as premature when the criminal proceedings were still pending (see, ***Kesik v. Turkey****, (dec.), no. 18376/09, 24 August 2010 and* ***Simons v. Belgium*** *(dec.), no. 71407/10, 28 August 2012) and, where the applicant had ultimately been acquitted, the complaint was rejected on the ground that the applicant had no victim status (see* ***Bouglame v. Belgium*** *(dec.), no. 16147/08, 2 March 2010).*

The Court finds no reason to deem otherwise in the present case. Without prejudice to the applicant`s possibillity of bringing new proceedings before this Court in the event of a conviction by the domestic courts, as matters stand to date, given that the criminal proceedings against the applicant are currently pending before the domestic courts, the Court finds this complaint to be premature.

Consequently, this part of the application must be rejected, pursuant to Article 35 §§ 1 and 4 of the Convention, for non-exhaustion of domestic remedies.

Fil-kaz ta` **Tyrone Fenech and others v. Malta** deciz fil-5 ta` Jannar 2016, l-ECHR qalet hekk :-

The Government submitted that the applicants` complaint was premature as their criminal proceedings were still pending. It was thus possible that the applicants would not be found guilty in which case they could not be considered victims in terms of the Convention (they referred to ***Bouglame v. Belgium*** *(dec.), no. 16147/08, 2 March 2010). The Government contended that examining the applicants` complaint at this stage would not enable the Court to assess the` basis of the applicants` "conviction", which had not yet taken place.*

The applicants` observations were submitted outside the time-limit set by the Court and no explanation was submitted as to why they had remained outstanding. The President of the relevant Section,

thus decided that they should not be included in the case-file for consideration by the Court.

The Court notes that according to its constant case-law the question whether or not court proceedings satisfy the requirements of Article 6 § 1 of the Convention can only be determined by examining the proceedings as a whole, that is, once they have been concluded. However, the Convention organs have also held that it is not impossible that a particular procedural element could be so decisive that the fairness of the proceedings could be determined at an earlier stage (see, inter alia, ***Papadopoulos v. Greece*** *(dec.), no. 52848/99, 29 November 2001;* ***Arrigo and Vella v. Malta*** *(dec.), no. 6569/04, 10 May 2005 and* ***Pace v. Malta*** *(dec.), no. 30651/03, 8 December 2005). At the same time, the Convention organs have also consistently held that such an issue can only be determined by examining the proceedings as a whole, save where an event or particular aspect may have been so significant or important that it amounts to a decisive factor for the overall assessment of the proceedings as a whole – pointing out, however, that even in those cases it is on the basis of the proceedings as a whole that a ruling should be made as to whether there has been a fair hearing of the case (see, inter alia,* ***Mitterrand v. France*** *(dec.) no. 39344/04, 7 November 2006 and more recently,* ***De Villepin v. France*** *(dec.), no. 63249/09, 21 September 2010).*

In the present case the criminal proceedings concerning the applicants have not come to an end. Thus, although the constitutional jurisdictions have already decided the matter, the Court considers that it cannot be excluded that, inter alia, the applicants be eventually acquitted or that proceedings be discontinued (compare, ***Dimech****, cited above, § 46).*

The Court observes that applications concerning the same subject matter as that at issue in the present case were rejected as premature when the criminal proceedings were still pending (see, ***Dimech****, cited above, § 48,* ***Kesik v. Turkey****, (dec.), no. 18376/09, 24 August 2010 and* ***Simonsv. Belgium*** *(dec.), no. 71407/10, 28 August 2012) and, where the*

*applicant had ultimately been acquitted, the complaint was rejected on the ground that the applicant had no victim status (see **Bouglame v. Belgium** (dec.), no. 16147/08, 2 March 2010).*

The Court finds no reason to deem otherwise in the present case. Without prejudice to the applicants` possibility of bringing new proceedings before this Court in the event of a conviction by the domestic courts, as matters stand to date, given that the criminal proceedings against the applicants are currently pending before the domestic courts, the Court finds this complaint to be premature.

Consequently, this part of the application must be rejected, pursuant to Article 35 §§ 1 and 4 of the Convention, for non-exhaustion of domestic remedies."

Il-kwadru li johrog minn din il-gurisprudenza fl-assjem taghha huwa li meta l-proceduri li dwarhom isir l-ilment ikunu ghadhom ma ntemmewx, u ma jkunx ghadu maghruf kif se jkun zvantaggjat ir-rikorrent, il-procediment kostituzzjonali jista` jitqies intempestiv. Fl-istess waqt ilment dwar allegat ksur tal-jedd li jsir waqt proceduri li jkunu pendenti jista` jinghata konsiderazzjoni jekk id-dritt lamentat jkun x`aktarx ser jigi vjolat u jekk il-ksur ikun wiehed reali u imminenti.

Issir referenza ghad-decizjoni li tat din il-Qorti diversament presjeduta fl-4 ta` Lulju 2017 fil-kawza fl-ismijiet **Av. Dr. Samuel Azzopardi vs L-Avukat Generali et** (li minnha sar appell) fejn inghad :-

"Illi l-intimati eccipew l-intempestivita` tat-talbiet odjerni fil-kuntest tal-artikolu 6(1) tal-Konvenzjoni u tal-artikolu 39(2) tal-Kostituzzjoni billi hu pacifiku fil-gurisprudenza taghna li l-Qorti tinvestiga l-proceduri fl-assjem taghhom.

*Illi kif gie ritenut mill-Qorti Kostituzzjonali fil-kaz **Victor Lanzon et v Kummissarju tal-Pulizija** (Q. Kost. dec. fid-29 ta` Novembru 2004).*

"Huwa principju accettat kemm fil-gurisprudenza ta` Strasbourg kif ukoll f`dik ta` din il-Qorti li, biex wiehed jiddeciedi jekk kienx hemm nuqqas ta`

*smigh xieraq wiehed irid jara u jezamina l-procedura gudizzjarja kollha kemm hi fit-totalita` taghha. " (Ara wkoll ad.ezempju l-kaz **Van Mechelen and Others v. The Netherlands**, dec. 23 April 1997 – para. 50).*

Illi l-Avukat Generali eccepixxa l-intempestivita` tal-proceduri odjerni permezz tal-ewwel eccezzjoni tieghu billi l-kaz pendenti quddiem il-Qorti tal-Magistrati (Ghawdex) ghadu mhuwiex deciz. Ghalhekk jghid li biex tinsab lezjoni skont l-artikoli ccitati, jehtieg li l-process gudizzjarju jigi ezaminat fil-kumpless totali tieghu. Kwindi talab li din il-Qorti ma tezercitax is-setghat kostituzzjonali u konvenzjonali taghha. L-intempestivita` ta` din l-azzjoni hija wkoll sollevata mill-intimat Dr. Anton Refalo fir-raba` paragrafu tar-risposta tieghu.

Illi qabel xejn jigi senjalat li skont il-Kostituzzjoni kif ukoll skont il-Konvenzjoni Ewropea kif addottata fl-ordinament guridiku taghna permezz tal-Kap 319 tal-Ligijiet ta` Malta, kull persuna tista` tfittex harsien fejn id-drittijiet u l-libertajiet fondamentali tieghu/taghha mhux biss qed jigu miksura imma anke jekk x`aktarx ser jigu miksura.(art.46(1) tal-Kostituzzjoni u 4(1) tal-Kap 319 tal-Ligijiet ta` Malta).

Illi l-art.39(2) tal-Kostituzzjoni jiddisponi …

Ukoll fl-artikolu 6(1) tal-Konvenzjoni Ewropea …

Illi izda, kontrarjament ghal dak sottomess mill-intimati, l-artikoli sucitati ma jimpedux lill-Qorti milli tinvestiga allegat ksur (attwali jew potenzjali) anke qabel ma jigu konkluzi l-proceduri pendenti quddiem il-Qorti tal-Magstrati (Ghawdex).

*Illi skont l-awturi Harris, O`Boyle & Warbrick , fil-ktieb **"Law of the European Convention on Human Rights**" :*

"A number of specific rights have been added to Article 6(1) through the medium of its `fair hearing` guarantee. The first of these to be established were ` equality of arms` and the right to a hearing in one`s presence. A breach of such a specific right may itself

amount to a breach of the right to a `fair hearing` without any need to consider other aspects of the proceedings.

As noted, in cases not involving a breach of a specific right, the Court may nonetheless find a breach of the right to a `fair hearing on a `hearing as a whole` basis".

Dan gie rikonoxxut u applikat mill-Qorti Ewropea, ad esempju, fil-kaz fl-ismijiet ***Arrigo and Vella v Malta*** *fejn gie ribadit li :*

"The Court recalls that the question whether or not court proceedings satisfy the requirements of Article 6 § 1 of the Convention can only be determined by examining the proceedings as a whole, i.e. once they have been concluded.

However, it is not impossible that a particular procedural element could be so decisive that the fairness of the proceedings could be determined at an earlier stage (see ***R.D. v. Spain****, no. 15921/89, Commission decision of 1 July 1991, Decisions and Reports (DR) 71, pp. 236, 243-244). The Court, noting that the criminal proceedings in question have not yet been completed, finds that the applicants` submissions do not disclose any such circumstances (see* ***Putz v. Austria****, no. 18892/91, Commission decision of 3 December 1993, DR 76-A, pp.51, 64). »*

Eccezzjoni simili ghal din kienet sollevata fil-kawza fl-ismijiet **Federation of Estate Agents vs Direttur Generali (Kompetizzjoni) et** (op. cit.)

Fid-decizjoni taghha, il-Qorti Kostituzzjonali kkonfermat dak deciz mill-Ewwel Qorti billi cahdet l-aggravju li l-azzjoni kienet intempestiva.

L-Ewwel Qorti kienet qalet hekk :

Ghar-rigward tat-tieni eccezzjoni, cioè l-intempestività tal-azzjoni tar-rikorrenti, il-qorti tifhem illi hija l-ligi stess cioè artikolu 12A, 13, 13A,

21 tal-Kap 379 illi qed tigi impunjata. Ergo akkuza ai termini tal-ligi Kap. 379, akkuza li ma gietx irtirata, li tikkozza mal-artiklu 39(1) tal-Kostituzzjoni ta` Malta, tilledi d-drittijiet fundamentali tal-assocjazzjoni rikorrenti b`mod immedjat.

Inoltre skond artikolu 46 tal-Kostituzzjoni kif ukoll il-korrispondenti artiklu fil-Konvenzjoni Ewropeja u cioè artikoli 4(1) Kap 319, huwa bizzejjed ghall-azzjoni dwar indoli kostituzzjonali li d-drittijiet lamentati jkunu qed jigu jew x`aktarx ser jigu miksura.

Ghaldaqstant il-qorti tichad it-tieni eccezzjoni tal-intimati.

Min-naha taghha l-Qorti Kostituzzjonali rrilevat :-

6. Din il-qorti tosserva qabel xejn illi sewwa tghid il-Federazzjoni illi, waqt illi taht il-Konvenzjoni l-Qorti Ewropea tad-Drittijiet tal-Bniedem ma ghandhiex is-setgha illi tqis allegazzjoni dwar ksur ta` drittijiet fondamentali qabel ma min iressaq l-ilment ikun inqeda bir-rimedji domestici kollha, taht il-Kostituzzjoni u taht l-Att dwar il-Konvenzjoni Ewropea l-Prim`Awla tal-Qorti Civili "tista`, jekk tqis li jkun desiderabbli li hekk taghmel, tirrifjuta li tezercita s-setghat taghha … f`kull kaz meta tkun sodisfatta li mezzi xierqa ta` rimedju ghall-ksur allegat huma jew kienu disponibbli … skont xi ligi ohra". Huwa ghalhekk imholli fid-diskrezzjoni tal-Prim`Awla – dejjem fil-parametri stabiliti fil-gurisprudenza – li taghzel "li tezercita s-setghat taghha" wkoll meta min iressaq l-ilment ikollu jew kellu mezzi ohra ta` rimedju, u meta l-Prim`Awla taghzel li tinqeda bis-setghat kostituzzjonali taghha l-Qorti Kostituzzjonali bhala regola ma tiddisturbax dik l-ghazla hlief meta tkun manifestament hazina jew meta hekk ikun mehtieg biex il-proceduri kostituzzjonali ma jigux trivjalizzati.

7. Din il-qorti tapprezza l-argumenti tal-Appellanti, partikolarment illi jkun ta` ostakolu ghall-efficjenza tal-gustizzja u tal-amministrazzjoni

pubblika jekk, malli titressaq kawza b`allegazzjoni li l-process quddiem tribunal jew korp imwaqqaf b`ligi huwa bi ksur tal-jedd ghal smigh xieraq, dak it-tribunal jew korp ma jkunx jista` jibda jwettaq id-dmirijiet tieghu qabel tinqata` dik il-kawza jekk il-Prim`Awla wisq facilment taghzel li tinqeda bis-setghat kostituzzjonali taghha flok tistenna li jintemmu l-proceduri quddiem dak it-tribunal jew korp biex tqis il-process fl-intier tieghu.

8. Madankollu, il-qorti tifhem ukoll illi fic-cirkostanzi tal-kaz tal-lum ikun aktar xieraq illi dan l-aggravju tal-Appellanti ma jintlaqax, u illi l-appell jinstema` wkoll fil-meritu partikolarment ghax ma jkunx ghaqli illi jitkompla l-process quddiem id-Direttur meta hemm sentenza ta` qorti ta` gurisdizzjoni kostituzzjonali li tghid illi dak il-process huwa bi ksur ta` jeddijiet fondamentali u dik is-sentenza ghalkemm ghadha mhix finali tkun thassret mhux ghal ragunijiet ta` meritu izda minhabba punt procedurali, b`mod illi d-decizjoni li sabet ksur ta` drittijiet tibqa` mdendla, biex nghidu hekk, fuq il-process.

Ladarba gà hemm decizjoni gudizzjarja li tohloq ghall-inqas dubju prima facie li l-process huwa vizzjat, ikun aktar ghaqli li dak id-dubju jew jigi konfermat jew jitnehha.

9. Barra minn hekk, fil-kaz tallum huwa l-process innifsu ta` kif issir xilja ta` attività anti-kompetitiva, u kif min jaghmel l-istess xilja ghandu wkoll is-setgha li jiddeciedi dwarha, illi huwa l-kawza tal-ilment kostituzzjonali. Fil-fatt l-ilment tal-Federazzjoni huwa dwar il-fatt li qieghed isir dan il-process u illi l-process innifsu, indipendentement mill-ezitu tieghu, jikser id-dritt taghha ghal smigh xieraq. Dan il-process u s-setghat tad-Direttur jibqghu l-istess ukoll jekk id-decizjoni finali tkun favur il-Federazzjoni. Fi kliem iehor, ghalkemm huwa minnu illi d-decizjoni li eventwalment jasal ghaliha d-Direttur tista` tkun favorevoli ghall-Federazzjoni li ghalhekk ma jibqghalhiex interess guridiku fil-kawza tallum, meta tqis illi l-ilment ewlieni tal-Federazzjoni jolqot il-process innifsu li jwassal ghad-decizjoni, u l-fatt li min jaghmel ix-xilja jiddeciedi wkoll dwarha, ma jkunx intempestiv li ilment jitqies minn issa ghaliex

ukoll fi tmiem il-process dawn il-fatturi sejrin jibqghu invarjati.

10. Ghal dawn ir-ragunijiet l-ewwel aggravju huwa michud.

(ara wkoll id-decizjoni li tat din il-Qorti kif presjeduta fl-14 ta` Dicembru 2017 fil-kawza fl-ismijiet **General Workers` Union v. Avukat Generali et** li minnha sar appell)

Il-Qorti qieset il-gurisprudenza fl-assjem taghha, u hasbet fit-tul dwar kif ghandha tkun applikata ghall-fattispeci u cirkostanzi tal-kawza tal-lum.

Abbazi tal-provi akkwiziti, jirrizulta illi sal-lum, il-Kummissjoni Elettorali qeghda taqdi r-rwol investigattiv taghha u ghadha ma waslitx fl-istadju li tiddeciedi dwar passi dixxiplinari kontra xi hadd, inkluz ir-rikorrenti. Il-Kummissjoni Elettorali ghadha fl-istadju inizjali ta` l-investigazzjoni ta` l-ilment. Fl-istess waqt din il-Qorti tqis illi l-ilment tar-rikorrenti ghandu jigi trattat u deciz fl-istadju attwali li tinsab fih il-procedura quddiem il-Kummissjoni Elettorali. Tghid dan ghaliex il-pern tal-kwistjoni li ghandha quddiemha din il-Qorti huwa l-process innifsu li hemm quddiem il-Kummissjoni Elettorali u cioe` jekk min jaghmel ix-xilja ghandux ukoll is-setgha li jiddeciedi dwarha. L-ilment huwa dwar il-fatt li qieghed isir dak il-process, kif ukoll illi l-process de quo, indipendentement mill-ezitu tieghu, skont ir-rikorrenti, jikser id-dritt ghal smigh xieraq. Ghalhekk ma hemm xejn intempestiv filli l-ilment jigi trattat u deciz minn din il-Qorti fl-istadju attwali li jinsab fih il-procediment quddiem il-Kummissjoni Elettorali.

Ghalhekk il-Qorti qeghda tichad it-tieni eccezzjoni tal-Avukat Generali.

V. L-ewwel (1) talba

Ir-rikorrenti qeghdin jitolbu dikjarazzjoni li in kwantu l-Kummissjoni Elettorali ghandha l-funzjonijiet li tinvestiga, takkuza, tiggudika u timponi penali fuq il-Partit rikorrent b`tali mod li hija ssir *judex in causa sua* jammonta ghal ksur tal-artikolu 39 tal-Kostituzzjoni u tal-artikolu 6 tal-Konvenzjoni.

Il-Kummissjoni Elettorali kkontestat it-talba billi ghamlet referenza ghas-sentenza li tat il-Qorti ta` l-Appell fl-24 ta` Gunju 2016 fil-kawza fl-ismijiet **Smash Communications Limited vs Awtorita` tax-Xandir et**.

Il-Kummissjoni sahqet li hemm kien deciz li ma kienx hemm ksur tal-principji ta` gustizzja naturali.

Inghad inoltre li ma kienx kaz li jwassal ghal *bias* precizament ghaliex skont il-ligi kien ir-regolatur innifsu u mhux altrimenti li kellu jiddeciedi.

Il-Qorti tal-Appell irreferiet ghad-decizjoni tal-Ewwel Qorti :-

> *L-ewwel qorti fis-sentenza moghtija fis-7 ta` Frar sabet illi jekk l-Awtorità tax-Xandir tisma` u taghti decizjoni fuq akkuza migjuba kontra s-socjetà attrici mill-Kap Esekuttiv tal-istess Awtorità dan ikun bi ksur tal-principju nemo judex in causa propria ghas-segwenti ragunijiet :*
>
> *L-artikolu 5 tal-Att dwar ix-Xandir huwa ddedikat lill-Kap Esekuttiv taI-Awtorita illi jinhatar mill-Awtorità nnifisha, wara illi jkun hemm sejha pubblika. Ghalhekk jirrizulta li l-Kap Esekuttiv huwa impjegat tal-Awtorità*
>
> … … …
>
> *Illi l-persuna illi tinhatar bhala Kap Esekuttiv tista` tigi delegata s-setghat u d-dmirijiet illi l-Awtorità jidhrilha mehtiega jew xierqa sabiex taghtih setgha illi jmexxi x-xoghol tal-Awtorità nnifisha (artikolu 5(3) tal-Att dwar ix-Xandir). Ghalhekk id-delegazzjoni taI-poteri u d-dmirijiet mill-Awtorità lill-istess Kap Esekuttiv mhix limitata, u, effettivament, mhux biss hemm ness qawwi bejn l-Awtorità u l-Kap Esekuttiv taghha, talli jista` jinghad illi l-Kap Esekuttiv huwa l-lunga manus tal-Awtorità.*
>
> *Essenzjament, legalment, ma hemmx distinzjoni bejn l-Awtorità u l-Kap Esekuttiv taghha, u lanqas bejn il-funzjoni u l-hidmiet taghhom.*

Illi huwa inkontestat f`din il-kawza li l-akkuzi fil-konfront tal-istazzjonijiet tax-xandir jinhargu mill-Kap Esekuttiv tal-Awtorità tax-Xandir, filwaqt illi d-decizjonijiet relattivi ghall-istess akkuzi jittiehdu mill-Bord tal-Awtorità tax-Xandir. Il-fatti kif irrizultaw mill-provi ma jindikawx li l-Kap Esekuttiv jiehu decizjoni mbaghad dik id-decizjoni tista` tigi appellata fil-Bord tal-Awtorità tax-Xandir. Il-hrug tal-akkuzi u d-decizjoni hija parti mill-istess sistema fejn il-Kap Esekuttiv u l-Bord jidher li huma kumplimentari ghal xulxin.

… … …

Illi s-socjetà attrici tissottometti illi l-fatt illi l-prosekutur illi jressaq l-akkuza, ossia l-Kap Esekuttiv, huwa impjegat tal-Awtorità tax-Xandir illi tiggudika l-istess akkuza, imur kontra l-principju nemo iudex in causa propria. L-argument huwa fis-sens illi l-Awtorità qed tagixxi ta` mhallef fuq akkuza illi tohrog hija stess tramite l-impjegat taghha l-Kap Esekuttiv, u illi huwa ingust illi wiehed jigi akkuzat u ggudikat mill-istess sors. ll-principju nemo iudex in causa propria qieghed jigi Iez mill-konvenuti stante illi l-Kap Esekuttiv tal-Awtorità tax-Xandir, illi jressaq l-akkuza u jagixxi ta` prosekutur, huwa ufficjal u impjegat ossia d-delegat tal-istess Awtorità tax-Xandir, illi hija l-gudikant. Inoltre, l-akkuzi ma jistghux jigu ikkontestati mill-ewwel u cioè b`xi tip ta` `challenge` kontra l-Kap Esekuttiv. Effettivament il-Bord tax-Xandir qisha tohrog l-akkuzi u tiggudika fuq l-akkuzi li tkun harget hija u dan ghaliex id-distinzjoni bejn il-Kap Esekuttiv u l-Bord mhux assolutament cara fil-ligi stess, u dan anke ghaliex l-istess Kap Esekuttiv jirrispondi bil-ligi lejn l-istess Awtorità li taghha huwa ufficjal.

Illi il-fatt [hu] li l-Kap Esekuttiv huwa mahtur mill-Awtorità tax-Xandir stess u jaqdi l-funzjonzijiet li din joghgobha tiddelegalu, u ghalhekk huwa parti integrali mill-istess Awtorità, jew ahjar kif digà nghad precedentement, il-lunga manus taghha. Huwa ghalhekk illi s-socjetà attrici qieghda ssostni illi akkuza illi tinhareg mill-konvenut Kap Esekuttiv ma tistax tinstema` u tigi deciza mill-konvenuta Awtorità tax-Xandir minghajr ma

jinkiser il-principu nemo iudex in causa propria u dan l-ilment jidher illi huwa gustifikat.

Illi din il-qorti taqbel … … … li huwa minnu li l-Ligi tax-Xandir taghmel separazzjoni bejn il-Kap Esekuttiv li johrog l-akkuza, u l-Awtorità taxXandir li tiddeciediha. Huwa wkoll minnu illi l-Kap Esekuttiv ma jihux parti fid-deliberazzjonijiet u fid-decizjonijiet tal-Awtorità tax-Xandir, u fil-fatt lanqas ghandu vot. Madanakollu, din id-distinzjoni ma jidhrix li hija sufficjenti sabiex jigi rispettat il-principju nemo iudex in causa propria.

Dan ghaliex, apparti l-fatt illi, legalment, il-Kap Esekuttiv huwa ddelegat tal-Awtorità tax-Xandir (artikolu 5 u 7 tal-Att Dwar ix-Xandir), fil-prattika hemm hafna interazzjoni u komunikazzjoni bejn iz-zewg konvenuti f`din il-kawza. Effettivament, il-prosekutur u l-gudikant … … … jagixxu mill-istess ufficini, bl-istess impjegati u b`komunikazzjoni interna bejniethom. Sahansitra l-Kap Esekuttiv, ossia l-prosekutur, huwa mhallas mill-istess Awtorità tax-Xandir, ossia l-gudikant !

… … …

Illi ghalhekk indipendentement ghal dak li jigri jew jista` jigri filprattika, jidher li s-sistema kif inhi llum hija tali li tikser il-principju ta` nemo iudex in causa propria. Is-sistema hija tali li l-Kap Esekuttiv bhala impjegat u delegat tal-Awtorità, tant li skond l-artikolu 5 tal-Kap. 350 huwa indikat bhala Chief Executive tal-Awtorità, oggettivament u effettivament ma huwiex funzjonarju li huwa indipendenti mill-Awtorità u allura f`dan il-kaz ma jistax jinghad li l-prosekutur huwa indipendenti u mhux suggett ghall-indhil, interferenza jew sahanistra kolluzjoni mal-Awtorità.

Mil-lat l-iehor, lanqas jista` jinghad li l-Awtorità hija supra partes u ghal kollox indipendenti u imparzjali minnhom, peress li wiehed mill-partijiet fil-kawza, ossia l-prosekutur, huwa effettivament impjegat tal-gudikant, f`dan il-kaz l-Awtorità tax-Xandir, u ghalhekk certament li fit-teorija (anke jekk mhux bilfors fil-prattika – almenu din mhix il-lamentela fil-kaz odjern) jista` jinghad li l-Awtorità

ghandha interess li tiffavorixxi lill-impjegat taghha, jew dak li qed ighid l-impjegat u sahanistra d-delegat taghha.

… … …

Illi dak li qed jinghad sa issa jidher sahanistra ictu ocoli. Analizi aktar approfrondita tkompli tindika kemm fil-fatt il-Kap Esekuttiv u l-Awtorità huma maqghudin flimkien b`tali mod u manjiera li jista` jinghad li jikkostitwixxu sahanistra entità wahda. Fil-fatt jirrizulta li l-Awtorità tax-Xandir hija entità mahluqa mill-Kostituzzjoni u mill-Att Dwar ix-Xandir, mentri l-Kap Esekuttiv huwa impjegat u delegat tal-istess Awtorità u effettivament amministrattur taghha. … … … U minn hawn tibda tidher il-problema, ghaliex anke superficjalment u mad-daqqa t`ghajn … … … jekk il-Kap Esekuttiv tal-Awtorità tax-Xandir huwa parti mill-Awtorità tax-Xandir u jekk dak li jaghmel il-Kap Esekuttiv jaghmlu f`isem l-Awtorità tax-Xandir, meta tiddeciedi l-akkuza l-Awtorità tkun qed tiggudika xi haga li saret f`isimha stess.

Illi jekk imbaghad tigi analizzata r-relazzjoni bejn l-Awtorità tax-Xandir u l-Kap Esekuttiv, issib fl-ewwel lok li l-Kap Esekuttiv jinhatar mill-istess Awtorità – ghalhekk, sa mill-principju, ghandek sitwazzjoni illi timmina l-indipendenza bejn dawn iz-zewg konvenuti. Inoltre, il-hlas tas-salarju lill-Kap Esekuttiv isir mill-Awtorità tax-Xandir stess – dan huwa element iehor illi jgieghel lill-pubbliku jistaqsi dwar is-separazzjoni u l-indipendenza effettivi ta` dawn it-tnejn minn xulxin.

Sahansitra, hekk kif xehed il-konvenut Dottor Kevin Aquilina fis-6 ta` April 2005 quddiem din il-qorti, l-Awtorità tista` titlob lill-Kap Esekuttiv jaghmel xi verifiki u, jekk ma jipprovdihomx, tista` tiehu passi dixxiplinarji kontra tieghu ghaliex huwa impjegat taI-Awtorità. Ghalhekk il-Kap Esekuttiv ghandu kull interess u huwa attwalment tenut li jimxi mal-vizjoni tal-Awtorità sabiex jissalvagwardja l-impjieg tieghu, illi jista` jigi terminat mill-istess Awtorità. … … …

Illi izda apparti l-element formalistiku, jew ta` ligi industrijali jew procedurali, u forsi aktar importanti minn hekk, hemm interazzjoni kontinwa u giornaliera bejn il-Kap Esekuttiv u l-Awtorità, kemm fit-teorija u kif ukoll fil-prattika. … … …

Illi dan juri illi l-Kap Esekuttiv u l-Awtorità jahdmu u jinteragixxu b`mod u manjiera illi jrenduhom jidhru bhala haga wahda, jew tal-anqas bhala zewg entitajiet kompletament interdipendenti. Il-Kap Esekuttiv Dottor Kevin Aquilina diversi drabi insista illi l-akkuza tinhareg fuq gudizzju personali tieghu, illi hu biss ghandu d-diskrezzjoni dwar dan u illi l-Awtorità fl-ebda punt ma tindahallu dwar l-akkuzi illi huwa johrog. Izda dak li fil-fatt jigri jista` jkun mod iehor u dan in vista li l-istess Kap Esekuttiv huwa dejjem id-delegat tal-Awtorità f`dak kollu li jaghmel, tant li hija l-ligi stess li tiddefinih bhala tali u ghalhekk huwa ma jistax jiddistaka ruhu minn din il-konnessjoni li hija wahda inezawribbli (sic), u bil-ligi ma tistax tigi injortata, b`dan li allura r-realtà hija mod iehor.

… … …

ghalkemm il-funzjonijiet tal-Kap Esekuttiv ma jinkludux sehem fid-deliberazzjonijiet u d-decizjonijiet tal-Awtorità tax-Xandir, l- istess konvenut Dottor Kevin Aquilina ammetta fix-xiehda tieghu illi huwa gieli jkun prezenti ghal-laqghat tal-Awtorità fejn jigu deliberati l-akkuzi, ghalkemm ma jippartecipax fid-dibattitu peress illi lanqas ghandu vot. Ghalhekk filwaqt illi l-Kap Esekuttiv ikun prezenti, l-akkuzat huwa ghal kollox estraneu ghaliex la jkun prezenti personalment u lanqas tramite xi konsulent legali tieghu ghall-istess deliberazzjonijiet.

Dan il-fattur ikompli jimpingi serjament fuq l-immagini ta` imparzjalità u ta` smigh xieraq u gust.

… … …

Illi wiehed ikompli jifhem kemm hemm kuntatt direct bejn il-Kap Esekuttiv u l- Awtorità meta, kif

inghad fix-xiehda tal-konvenut Kap Ezekuttiv Dottor Kevin Aquilina fis-6 ta` April 2005, l-Awtorità tax-Xandir gieli tibghat ghall-istess Kap Esekuttiv waqt id-deliberazzjonijiet taghha, ghal kjarifici teknici jew sabiex tintalab il-history sheet tal-istazzjon.

Ghalhekk, ghal darb`ohra, ghandek interazzjoni inaccettabbli bejn il-prosekutur u l-gudikant fl-istadju tad-deliberazzjoni dwar l-akkuza, u certament illi ma jistax jinghad illi I-Kap Esekuttiv assolutament m`ghandux x`jaqsam mal-Awtorità tax-Xandir u illi dawn jagixxu separatament u indipendentement f`din il-funzjoni.

Illi minn dan kollu jirrizulta li fil-prattika ghandek sitwazzjoni fejn kontinwament, sa mill-bidu nett illi jsir il-monitoring (sahansitra qabel tohrog l-akkuza) u fl-iter shih sakemm jinghata il-gudizzju, l-Awtorità hija dik illi tregi u dan minkejja l-fatt illi, tramite d-diversi dipartimenti u karigi (dejjem fi hdan l-istess entità), tinghata l-impressjoni illi l-funzjoni tal-Awtorità hija unikament ta` gudikant. Izda minkejja dan kollu xorta wahda jinghad li ghalkemm jidher li hemm diversi rjus fl-istess Awtorità xorta wahda hija dejjem Awtorità wahda li ghandha diversi funzjonijiet kemm amministrattivi, esekuttivi u anke kwazi-gudizzjarji u dan huwa pregudikanti ghall-persuni li jkunu gew akkuzati mill-istess Awtorità u jkunu ser jigu gudikati minna stess.

Fl-istadju tal-appell, l-intimati *inter alia* sostnew illi huma mxew kif trid il-ligi u ma setghux jimxu mod iehor. Kien rilevat illi meta l-Ewwel Qorti sostniet illi, ghax imxew kif riedet il-ligi, imxew hazin u kellhom jimxu mod iehor, kienet qieghda effettivament tghid illi l-ligi ma kellhiex ikollha effett, haga li l-Qorti ma setghetx taghmel fil-kompetenza "*ordinarja*" taghha.

L-aggravju kompla jitfisser hekk :-

fil-kawza appellata, l-ghemil tal-Awtorità tax-Xandir kif ukoll tal-Kap Esekuttiv taghha kien ghemil li sar precizament skond il-ligi u ghalhekk dan l-ghemil ma kienx ultra vires. Billi l-ghemil kien skond il-ligi ma setax jkun jew jammonta ghal

ksur tal-principji ta` gustizzja naturali meta dik l-allegazzjoni timpernja ruhha biss fuq il-fatt li I-konvenuti agixxew, kif del resto kienu tenuti li jaghmlu, skond il-ligi.

F`dan il-kamp il-ligi dwar ix-xandir hija kategorika. Din il-ligi tirrikjedi li l-Kap Esekuttiv johrog akkuza fil-kazijiet konguwi fejn ihoss li hemm ksur tar-regolamenti tax-xandir; l-awtorità, bhala I-awtorità regolatrici, tikkonsidra hija dik l-akkuza u tiddeciedi dwarha b`mod kompletament indipendenti mill-Kap Esekuttiv; meta l-awtorità tiehu dik id-decizjoni hija tenuta li tosserva l-principji ta` gustizzja naturali u cioè li taghti lill dak li jkun smigh xieraq. Dan kollu huwa direttament stipulat fil-ligi nnifisha. lssa kien jkun forsi differenti kieku l-argument tal-atturi kien li dik il-ligi tikser id-drittijiet fondamentali taghhom; imma jigi precizat li dak mhux l-argument tal-atturi. Anzi I-atturi jassumu Ii l-ligi qieghda sew. L-atturi bI-ebda mod ma jilmentaw mid-disposizzjonijiet tal-ligi.

Biex l-esponent jaghmel il-posizzjoni tieghu cara, huwa ma jhossx li d-disposizzjonijiet tal-ligi b`xi mod iwasslu ghall-ksur ta` xi dritt fondamentali; anzi huwa risaput li fejn wiehed ghandu funzjoni regolatrici amministrattiva s-sitwazzjoni bil-fors tkun hekk, u dan insibuh f`kull qafas ta` regolazzjoni – bhalma huwa I-qafas finanzjarju, il-qafas ta` komunikazzjoni, il-qafas ta` kompetizzjoni gusta u ezempji ohra mid-dritt amministrattiv interminabbili. Il-posizzjoni tal-atturi ggib fix-xejn il-qafas regolatur tal-amministrazzjoni pubblika bil-konsegwenzi serj li dan igib mieghu. Issa jekk tassumi – kif wiehed ghandu dritt li jaghmel u kif wiehed huwa obbligat li jaghmel la darba d-disposizzjonijiet legali ma gewx messi in diskussjoni – li l-ligi qieghda sewwa ma jistax imbaghad jallega li min jimxi strettament skond il-ligi jkun qieghed jagixxi b`xi mod ultra vires jew bi ksur tal-principji ta` gustizzja naturali sakemm ma jkunx jista` jintwera xi element ta` parzjalità li ma jitwelidx, kif donnu jippretendu l-atturi, mil-ligi nnifisha. … … …

Barra minn dan, ma jistax jinghad illi l-Awtorità tax-Xandir naqset milli tosserva l-principji tal-gustizzja naturali jekk din semplicement imxiet skond dak li tghid iI-ligi. Ghalhekk il-qorti fl-ewwel istanza ma setghetx tiddeciedi li l-Awtorità tax-Xandir u l-Kap Esekuttiv ma osservawx iI-principji ta` gustizzja naturali meta dawn semplicement kienu qeghdin jagixxu skond il-ligi. Ghalhekk fir-realtà ma kien hemm assolutament xejn x`jistharrgu u fil-verità, se mai, hija I-ligi nnifisha li kellha tigi attakkata u dan kellu jkun b`kawza fejn it-talba tkun ibbazata fuq vjolazzjoni tal-artikoli kostituzzjonali u tal-konvenzjoni. L-Awtorità tax-Xandir u l-Kap Esekuttiv imxew skond dak illi trid il-ligi, fosthom I-artikolu 41 tal-Att dwar ix-Xandir (Kap 350 tal-Ligijiet ta` Malta).

IlIi bir-rispett kollu lejn il-qorti taI-ewwel istanza, id-decizjoni qieghda effettivament tghid illi I-ligi nnifisha ma tistax tigi segwita ghaliex bilfors twassal ghall-ksur tal-principju ta` gustizzja naturali nemo iudex in causa propria. Fil-konkluzjoni taghha l-qorti fl-ewwel istanza qieghda effettivament tghid illi I-ligi kif inhi ma tistax tigi applikata; u din ma setghetx tkun decizjoni moghtija bl-applikazzjoni tal-artikolu 469A kif inhi I-azzjoni tas-socjetà attrici appellata, izda setghet tkun biss, se mai, decizjoni minn qorti fil-kompetenza taghha bhala qorti kostituzzjonali fejn il-ligi stess hija attakkata u b`hekk il-qorti setghet tiddeciedi jekk il-ligi in kwistjoni setghetx tigi applikata jew kelliex tigi disapplikata billi tmur kontra d-drittijiet fondamentali tal-bniedem. Però kif gà spjegat, l-azzjoni istitwita fis-sentenza appellata m`hijiex azzjoni kostituzzjonali izda azzjoni bbazata fuq I-artikolu 469A tal-Kap. 12 tal-Ligijiet ta` Malta.

Ghalhekk dik il-qorti taI-ewwel istanza qatt ma setghet tasal ghal konkluzjonijiet Ii waslet ghalihom fejn effettivament qieghda twaqqaf lill-konvenuti appellanti milli jimxu ma dak illi tghid il-ligi. L-Awtorità tax-Xandir imxiet mal-procedura indikata mill-ligi u, jekk is-socjetà attrici appellata ma kenitx kuntenta b`din l-istruttura, hija kellha tistitwixxi azzjoni sabiex din il-ligi tigi disapplikata u dan setghu biss jaghmluh billi jifthu kawza

kostituzzjonali u mhux kawza ta` stharrig gudizzjarju ta` azzjoni amministrattiva taht I-artikolu 469A. Fil-fatt, l-artikolu 469A jghid carissimu illi din l-azzjoni tista` biss tigi istitwita meta l-awtorità pubblika agixxiet barra mil-poteri moghtija lilha skond il-ligi jew ultra vires.

Hija l-ligi li taghti lill-Kap Esekuttiv l-awtorità li johrog l-akkuzi u hi l-ligi li taghti lill-Awtorità tax-Xandir l-awtorità li tiggudika u tiddeciedi fuq dawn l-akkuzi. Ghalhekk kif tista` l-ewwel qorti tiddikjara li l-konvenuti "ma kellhom ebda awtorità li jiggudikaw lis-socjetà kummercjali attrici jew li jimmultawha jew li jitolbuha biex tersaq quddiemhom biex taghmel is-sottomissjonijiet taghha dwar l-akkuza li biha giet akkuzata mill-konvenuti indikati fic-citazzjoni odjerna ?

Dwar dan l-aggravju, il-Qorti ta` l-Appell qalet hekk :-

10. L-argument tal-konvenuti huwa validu. Huwa minnu illi, taht l-art. 469A(1)(a) tal-Kodici ta` Organizzazzjoni u Procedura Civili, il-qorti fil-kompetenza "ordinarja" taghha tista` thassar ghemil amministrativ jekk dan "jikser il-Kostituzzjoni"; madankollu, dik il-gurisdizzjoni tolqot biss l-ghemil amministrativ u mhux il-ligi li tahtha jsir, b`mod illi, jekk l-ghemil ikun sar kif tridu l-ligi meta l-ligi ma thalli ebda diskrezzjoni dwar kif ghandu jsir dak l-ghemil amministrattiv, il-qorti ma tistax tghid illi l-ligi ghandha titqies li ma ghandhiex effett, ghax dak tista` taghmlu biss fil-kompetenza "kostituzzjonali" taghha, u lanqas ma jkollha l-possibilità li tinterpreta l-ligi ordinarja b`mod "konformi" mal-Kostituzzjoni jekk dik l-interpretazzjoni ma tkunx possibbli minghajr ma, effettivament, tghid illi l-ligi ma tiswiex. Dan ma jfissirx illi meta l-ligi taghti diskrezzjoni u l-awtorità tinqeda b`dik id-diskrezzjoni b`mod li jikser il-Kostituzzjoni dak l-ghemil ma jistax jithassar taht l-art. 469A(1)(a), ghax diskrezzjoni moghtija b`ligi xorta tista` tinqeda biha b`mod li jikser il-Kostituzzjoni; li jfisser hu illi, jekk il-ligi ma thallix ghazla dwar kif l-awtorità ghandha timxi, hija biss il-qorti fil-kompetenza taghha

kostituzzjonali li tista` thassar dak l-ghemil billi tghid illi l-ligi ma ghandhiex ikollha effett.

11. Incidentalment, ghandu jinghad illi l-Prim`Awla tal-Qorti Civili ghandha s-setgha, taht l-art. 46(3) tal-Kostituzzjoni, illi tassumi kompetenza "kostituzzjonali" wkoll f`kawza "ordinarja", izda fil-kaz tallum dan ma ghamlitux, x`aktarx ghax il-kwistjoni ta` ksur tal-Kostituzzjoni ma "qamitx" waqt il-proceduri izda kienet effettivament wahda mill-premessi tal-talbiet tal-attrici mill-bidunett tal-kawza u ghalhekk il-kwistjoni kellha titqajjem ab initio b`rikors kostituzzjonali.

12. Naturalment, dan kollu jiswa jekk tassew il-konvenuti mxew kif trid il-ligi u ma kellhomx ghazla li jimxu mod iehor; ghalhekk imiss issa li naraw jekk il-konvenuti tassew imxewx kif trid il-ligi – kif qeghdin ighidu huma – jew imxewx ma` "konvenzjonijiet" mahluqa "abuzivament" minnhom stess, kif tghid Smash.

13. Il-kwistjoni mela hi jekk il-konvenuti setghux jimxu mod iehor flok ma tinhareg l-akkuza minn organu tal-Awtorità – fil-kaz tallum mill-Kap Esekuttiv taghha – biex tinghata decizjoni fuq dik l-akkuza mill-istess Awtorità. Qari tal-art. 41 tal-Kap. 350 juri illi hija effettivament l-Awtorità li tohrog "avviz ta` akkuza" u li tiddeciedi dwar dik l-akkuza. Ghalhekk ma setax isir mod iehor hlief illi jinghata l-"avviz ta` akkuza" mill-Awtorità jew minn organu taghha sabiex eventwalment l-istess Awtorità tiddeciedi jekk hemmx htija taht l-akkuza wara li "tosserva l-garanziji ta` smigh xieraq u fil-pubbliku". Fi kliem iehor, l-akkuza ma setghetx inharget minn xi persuna jew korp iehor li ma jkunx parti mill-Awtorità, kif effettivament tghid illi kellu jsir is-sentenza appellata.

14. Ghalhekk, ghar-ragunijiet moghtija fuq, is-sentenza tal-ewwel qorti effettivament hija "disapplikazzjoni" tal-ligi, haga li l-qorti fil-kompetenza "ordinarja" taghha ma setghetx taghmilha. Dan l-aggravju tal-konvenuti ghalhekk ghandu jintlaqa` u ma jibqax mehtieg li nqisu l-aggravji l-ohra.

Fil-kawza appena citata, l-ilment dwar ksur tal-principju tal-gustizzja naturali : *nemo judex in causa sua* : kien sorvolat ghaliex il-kawza kienet intavolata quddiem qorti ta` kompetenza *ordinarja* mhux kostituzzjonali. Ghalhekk ic-cirkostanzi ta` *dak* il-kaz huma differenti minn dawk tal-kaz tallum.

L-iter li trid issegwi l-Kummissjoni Elettorali fil-qadi tal-funzjoni regolatrici affidata lilha mil-ligi kien spjegat mill-Kummissjoni Elettorali finnota ta` sottomissjonijiet taghha u cioe` :-

Tinvestiga biex tara x` inhuma l-fatti u jekk hemmx kaz li jistghu jkunu qeghdin jinkisru r-regolamenti dwar il-finanzjament tal-partiti ;

Fil-kazijiet kongruwi *tixli* lill-partit politiku, jekk ikun il-kaz (dan jiddependi mill-ezitu tal-investigazzjoni) bi ksur tar-regolamenti u taghti lill-partit koncernat l-opportunita` li jirrispondi u jiddefendi ruhu ;

*Tisma`* direttament hi (cioe` l-Kummissjoni stess) il-provi li jkun hemm fil-prezenza tal-entita` regolata u taghti lill-entita` regolata kull possibilita` li tikkontroezamina dawk il-provi jew li ggib il-provi li jidhrilha xierqa ghaddifiza taghha ;

Tiddetermina kienx hemm ksur jew le tal-ligi ; u

Tikkomina piena skont il-ligi jekk jirrizulta ksur tal-ligi.

Skont din l-espozizzjoni, jirrizulta li fil-prattika, ghandek sitwazzjoni fejn kontinwament, sa mill-bidu nett, sahansitra qabel tinhareg l-akkuza u fl-iter shih sakemm jinghata l-gudizzju, il-Kummissjoni Elettorali hija dik illi tmexxi. Il-Kummissjoni Elettorali ghandha funzjonijiet : amministrattivi, esekuttivi u kwazi gudizzjarji.

Issir referenza ghal dak li qal Lord Denning fid-decizjoni fil-kawza **Metropolitan Properties Co. vs. Lannon** (1968) [3 All ER 304] :-

> *"In considering whether there is a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the Chairman of the tribunal or whoever it might be, who sits in a judicial position. It does not look to see if there was real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was impartial as could be,*

nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit."

Dan premess, il-Qorti tqis li skont il-Kap 544, il-Kummissjoni Elettorali ghandha s-setgha li tinvestiga, li tghaddi gudizzju u li taghti kastig. Madanakollu l-Qorti tqis ukoll illi bhala regolatur, il-Kummissjoni Elettorali mhijiex prosekutur ghaliex l-ghan taghha huwa biss li tassikura li r-regoli jigu osservati. Il-Kummissjoni Elettorali ma tkun qed tiehu l-ebda vantagg ghaliha meta ssib nuqqas minn xi partit politiku. Il-funzjoni taghha hija wahda ta` ordni pubbliku sabiex jigi assigurat is-sors ta` donazzjonijiet. Il-Kummissjoni Elettorali hija *supra partes* u ghal kollox indipendenti u imparzjali mill-partit politiku li jkun qed jigi investigat.

Il-Kummissjoni Elettorali hija kostitwita bis-sahha ta` l-**Art 60 tal-Kostituzzjoni** li jaqra hekk :-

(1) Ghandu jkun hemm Kummissjoni Elettorali ghal Malta.

(2) Il-Kummissjoni Elettorali tkun maghmula minn Chairman,li jkun il-persuna li ghal dak iz-zmien ikollha l-kariga ta`Kummissjonarju Elettorali Principali u li tkun mahtura ghal dik il-kariga mis-servizz pubbliku, u dak in-numru ta` membri li ma jkunx anqas minn erbgha li jista` jkun preskritt b`xi ligi li ghal dak iz-zmien tkun issehh f`Malta.

(3) Il-membri tal-Kummissjoni Elettorali ghandhom jigu mahtura mill-President, li jagixxi skont il-parir tal-Prim Ministru, moghti wara li jikkonsulta l-Kap tal-Oppozizzjoni.

(4) Hadd ma jkun kwalifikat li jzomm kariga bhala membru tal-Kummissjoni Elettorali jekk ikun Ministru, Segretarju Parlamentari, membru ta`, jew kandidat ghall-elezzjoni ghal, il-Kamra tad-Deputati jew ufficjal pubbliku.

(5) Bla hsara ghad-disposizzjonijiet ta` dan l-artikolu, membru tal-Kummissjoni Elettorali ghandu jivvaka l-kariga tieghu –

(a) fit-tmiem ta` tliet snin mid-data tal-hatra tieghu jew f`dak iz-zmien qabel li jista` jkun specifikat fid-dokument li bih ikun gie mahtur; jew

(b) jekk jinqalghu xi cirkostanzi li, kieku ma kienx membru tal-Kummissjoni, kienu jgeghluh ikun skwalifikat ghall-hatra bhala tali.

(6) Bla hsara ghad-disposizzjonijiet tas-subartikolu (7) ta` dan l-artikolu, membru tal-Kummissjoni Elettorali jista` jitnehha mill-kariga mill-President li jagixxi skont il-parir tal-Prim Ministru.

(7) Membru tal-Kummissjoni Elettorali ma ghandux jitnehha mill-kariga hlief ghal inkapacità li jaqdi l-funzjonijiet tal-kariga tieghu (sew jekk minhabba mard mentali jew korporali jew ghal xi raguni ohra) jew ghal imgieba hazina.

(8) Jekk il-kariga ta` membru tal-Kummissjoni Elettorali tkun vakanti jew jekk membru ma jkunx jista` ghal xi raguni jaqdi l-funzjonijiet tal-kariga tieghu, il-President, li jagixxi skont il-parir tal-Prim Ministru, moghti wara li jkun ikkonsulta l-Kap tal-Oppozizzjoni, jista` jahtar persuna li tkun kwalifikata biex tkun mahtura bhala membru biex tkun membru temporanju tal-Kummissjoni; u kull persuna hekk mahtura ghandha, bla hsaraghad-disposizzjonijiet tas-subartikoli (5), (6) u (7) ta` dan l-artikolu, ittemm milli tkun membru bhal dak meta persuna tigi mahtura biex timla l-vakanza jew, skont il-kaz, meta l-membru lima kienx jista` jaqdi l-funzjonijiet tal-kariga tieghu jirrezumi dawkil-funzjonijiet.

(9) Fl-ezercizzju tal-funzjonijiet taghha skont din il-Kostituzzjoni l-Kummissjoni Elettorali ma tkunx suggetta ghad-direzzjoni jew kontroll ta` xi persuna jew awtorità ohra.

Il-Kummissjoni Elettorali m` ghandhiex interess li tiffavorixxi xi partit politiku li jkun qed jigi investigat. Hija organu li huwa awtonomu u indipendenti mill-Gvern tal-gurnata. Huwa minnu, kif irrizulta mix-xiehda, illi l-hatra tal-membri hija regolata minn konvenzjonijiet kostituzzjonali u usanzi politici izda dawn huma biss intizi sabiex jassiguraw li l-veduti tan-

nahat kollha li jkunu rapprezentati fil-Parlament jigu riflessi fil-komposizzjoni tal-Kummissjoni. Huwa minnu wkoll li l-hatra tal-membri tal-Kummissjoni Elettorali mhijiex ghal zmien illimitat izda ghal tliet (3) snin. Din il-Qorti ma taqbilx li ghaliex il-hatra tkun ghal tliet (3) snin allura dak huwa bizzejjed biex il-membri tal-Kummissjoni Elettorali jitilfu l-indipendenza taghhom. Kif kien osservat mill-Qorti Kostituzzjonali fis-sentenza li tat fil-25 ta` Jannar 2013 fil-kawza fl-ismijiet **Untours Insurance Agency Limited et vs Victor Micallef et** li kieku kien hekk il-kaz, kull membru ta` kull tribunal li tista` tiggeddidlu l-hatra ma jibqax indipendenti fl-ahhar tal-hatra tieghu ghax ikun motivat bit-tama li jinhatar mill-gdid.

Jekk toqghod fuq ix-xiehda tal-persuni li ddeponew, u li huma membri tal-Kummissjoni, jirrizulta illi irrispettivament min kien li rrakkomanda l-hatra taghhom fil-Kummissjoni, l-obbligu taghhom huwa lejn il-Kostituzzjoni u lejn it-tharis tal-ligi, mhux lejn partit jew iehor.

Is-suspett li ttenta jsir min-naha tar-rikorrenti fis-sens li meta jkun hemm il-htiega li tittiehed decizjoni b`xejra politika, il-votazzjoni dejjem tkun ta` hames (5) voti kontra erbgha (4) ma tammontax ghal prova inekwivoka li l-Kummissjoni Elettorali mhijiex indipendenti u awtonoma mill-Gvern tal-gurnata. Ma tressqet l-ebda prova oggettiva rilevanti li ssostni l-argument li l-partiti politici ghandhom influwenza fuq il-membru li jkun gie nominat b`tali mod li dawk il-membri jispiccaw jiddeciedu skont ix-xewqat tal-partit politiku li jkun ressaq `il quddiem in-nomina taghhom. Il-komposizzjoni tal-Kummissjoni Elettorali hija stabbilita mill-Kostituzzjoni li tqieghed ir-responsabbilita` fuq il-membru li jaqdi l-funzjoni tieghu b`mod indipendenti u imparzjali.

Anke minn qari tad-dibattiti dwar l-abbozz ta` ligi fil-Kamra tad-Deputati, jirrizulta li l-partit rikorrent ried li r-regolatur ma tkunx il-Kummissjoni Elettorali mentri l-Gvern kien favur li r-regolatur tkun il-Kummissjoni Elettorali :

21 ta` Lulju 2014 : Tieni Qari
Ministru Onor. Dr. Owen Bonnici :-

Il-Kummissjoni Elettorali se tkun qed tiehu hsieb dan il-process. Ghalfejn ghazilna l-Kummissjoni Elettorali ? Dan huwa punt fejn kien hemm nuqqas ta` qbil man-naha l-ohra tal-Kamra. Il-Kummissjoni Elettorali hija organu kostituzzjonali jigifieri tohrog mill-Kostituzzjoni li ilha mwaqqfa s-snin and it has a proven track record. Il-Kummissjoni Elettorali mexxiet

elezzjoni wara l-ohra minn mindu Malta saret indipendenti sal-lum. Allura ladarba l-Kummissjoni Elettorali has a proven track record of success, hija organu kostituzzjonali li digà jiffunzjona. Dan ifisser li ma jkollniex ghalfejn noholqu knejjes godda u naghmlu reklutagg ta` nies li jridu aktar zmien biex jidraw is-sistemi ghax ghandna Kummissjoni that can hit the ground running.

29 ta` Ottubru 2014 : Tieni Qari
Onor. Dr. Paula Mifsud Bonnici :

Issa, Sur President, nixtieq naqbad fuq koncett iehor, il-koncett tar-regolatur. Jiena naqbel li huwa importanti li jkollna ligi li tkun tahseb ghal regolatur li jissorvelja, jispezzjona u jiskrutinja lill-partiti politici; imma ma nista` naqbel qatt mal-proposta li din l-entità li tissorvelja, tispezzjona u tiskrutinja lill-partiti politici ghandha tkun il-Kummissjoni Elettorali. U ma naqbilx mhux biex inkun negattiva – kif jghajruna l-Membri tan-naha tal-Gvern – anzi ahna tant qed inkunu pozittivi li qed naghmlu l-proposti taghna. Ahna mhux biss ingergru u nikkritikaw, imma naghtu s-soluzzjonijiet biex naraw kif il-poplu Malti jista` jkollu ligi serja u effettiva verament.

Imma jiena kif jista` jkun naqbel li tkun il-Kummissjoni Elettorali dik li tirregola lill-partiti politici ?! Issa hawnhekk ma rrid bl-ebda mod ninstema` li qed nattakka lic-Chief Electoral Commissioner, u dak zgur li mhuwiex l-iskop tieghi, anke ghax, mill-ftit li nafu, nafu bhala bniedem ta` dekor u bhala bniedem li jimxi tajjeb u b`mod gust. Imma din hija xi haga li zgur ma nistax naqbel maghha. Kif nista` naqbel li titpogga bhala regolatur il-Kummissjoni Elettorali meta din hija maghmula minn erba` membri min-naha tal-Partit Nazzjonalista, minn erba` membri min-naha tal-Partit Laburista u minn Chief Electoral Commissioner li jkun maghzul mill-Gvern?! Nerga` nenfasizza li jiena m`iniex se noqghod niddiskuti lic-Chief Electoral Commissioner attwali, xejn affattu. Imma ma jistax ikun ikollok partiti politici jiskrutinjaw partiti politici stess. Din hija xi haga li zgur mhijiex se taghmel gid. Allura b`dan il-mod nistghu nigu f`sitwazzjoni fejn erba` membri se jkunu qeghdin jiggudikaw lill-partit politiku taghhom, u hames membri se jkunu qeghdin jiggudikaw lill-partit politiku oppost taghhom, u jien nahseb li din hija xi haga li m`ghandhiex tkun, anke ghax ma taghmilx sens. Kif ippropona l-Partit Nazzjonalista fil-fazi ta` konsultazzjoni, ir-regolatur ghandu jkun il-Kummissarju ghall iStandards Politici, li jigi mahtur b`zewg terzi tal-Kamra. Din hija proposta li wiehed jista` jsejhilha serja ghax qed ixxejjen kull suspett li l-Kummissjoni Elettorali tista`, b`xi mod jew iehor, tigi biased.

Kif digà ghedt, illum il-Kummissjoni Elettorali hija komposta minn membri taz-zewg partiti politici l-kbar li ghandna fil-pajjiz, u allura jien nistaqsi: X`se tkun il-pozizzjoni tal-partiti politici li llum mhumiex qeghdin rapprezentati fil-Kummissjoni Elettorali ? Mela allura, l-Kummissjoni Elettorali, li hija maghmula miz-zewg partiti politici l-kbar biss, se tkun tista`

tiskrutinja wkoll partiti politici li m`ghandhomx rapprezentanza fil-Kummissjoni Elettorali, u ma nahsibx li din hija gusta; anzi, fl-opinjoni tieghi, hija diskriminatorja kemm kontra l-partit li jkun fl-oppozizzjoni, u anke kontra dawk il-partiti li mhumiex rapprezentati fil-Parlament.

L-Abbozz ta` Ligi jsemmi hafna cirkostanzi li fihom il-Kummissjoni Elettorali se jkollha rwol importanti galadarba dan l-Abbozz ta` Ligi jsir ligi, u ghalhekk jien qed naghmel dawn id-domandi bl-ghan ewlieni li l-Ministru Bonnici mhux biss jirrispondini, imma li fl-ahhar mill-ahhar il-Gvern jiehu on board il-proposta li ahna qeghdin naghmlu sabiex ir-regolatur ma tkunx il-Kummissjoni Elettorali, imma jkun il-Kummissarju ghall-iStandards Politici……Iva, veru, hemm pajjizi li juzaw lill-kummissjoni elettorali bhala r-regolatur tal-partiti politici; imma, fil-verità, jekk wiehed jifli l-kompozizzjoni tal-kummissjonijiet elettorali barranin, isib li din hija kompletament differenti mill-kompozizzjoni tal-Kummissjoni Elettorali taghna ghax, filwaqt li l-kompozizzjoni tal-Kummissjoni Elettorali taghna hija komposta minn erba` membri mahtura mill-Partit Nazzjonalista, erba` membri mahtura mill-Partit Laburista, u mic-Chief Electoral Commissioner li jkun maghzul mill-gvern, barra minn Malta l-maggoranza tal-kummissjonijiet elettorali huma indipendenti u jirrispondu lill-parlament. Perezempju, il-Kummissjoni Elettorali Ingliza wkoll hija indipendenti, u fil-fatt din il-kummissjoni hija mahtura mill-Parlament Ingliz stess….Ghalhekk, Sur President, jien nahseb li, biex neliminaw dawn id-dubji serji kompletament dwar l-awtonomija tal-Kummissjoni Elettorali, rridu nuzaw formula ohra, u jiena nemmen li iva, il-proposta li se tkun qed taghmel l-Oppozizzjoni, cjoè dik li fl-Abbozz ta` Ligi l-frazi "Kummissjoni Elettorali" tinbidel ghal "Kummissarju ghall-iStandards Politici", hija proposta tajba hafna, hija ferm aktar trasparenti u allura tohloq sens ta` skrutinju serju u vigilanti biex ma jkollokx persuna li tkun xi portavoce ta` kulhadd. Anke jekk ma tkun il-portavoce ta` hadd, Sur President, huwa biss bil-proposta tal-Oppozizzjoni li ma jkunx hemm suspetti li din il-Kummissjoni tista` tkun qieghda tagixxi ghan-nom ta` haddiehor, jew li jkollha xi agenda partikolari. Dan jista` jigri biss billi jkollok kummissarju mahtur b`zewg terzi tal-Kamra.

Jekk ikollna Kummissarju ghall-iStandards Politici mahtur b`zewg terzi tal-Kamra, dan zgur li se jkun qieghed jimxi bl-aktar mod fair u bl-akbar sens ta` etika. Il-fatt fih innifsu li l-Kummissarju ghall-iStandards Politici jkun bniedem li jkun gie mahtur minn zewg terzi tal-Kamra jaghmilha aktar facli ghal kulhadd sabiex jonqsu s-suspetti hziena, u allura dan iwassal sabiex inkunu qeghdin inzidu l-fiducja li tant ghandhom bzonn in-nies t`hemm barra fil-partiti politici.

29 ta` Ottubru 2014 : Tieni Qari
Onor. Dr. Stefan Buontempo :

Sur President, l-Abbozz ta` Ligi li ghandna quddiemna llum jaghti aktar poteri lill-Kummissjoni Elettorali sabiex tirregola l-kompozizzjoni, kif

ukoll il-mod ta` kif il-partiti politici jagixxu. Fl-istess hin, id-diskrezzjoni tal-Kummissjoni Elettorali hija rregolata wkoll permezz tad-dritt tal-appell li jissemma fi klawsola 19, li tghid illi jekk il-partiti politici jhossuhom aggravati b`xi decizjoni li tkun ittiehdet fil-konfront taghhom mill-Kummissjoni Elettorali, ghandhom jirrikorru quddiem il-Prim`Awla tal-Qorti Civili. Però zgur li l-klawsoli li ghandhom l-akbar portata huma dawk li hemm taht Taqsima III u Taqsima IV ta` dan l-Abbozz ta` Ligi, liema taqsimiet jirrigwardaw il-htiega ta` kontabilità min-naha tal-partiti politici u l-kontroll tad-donazzjonijiet tal-partiti rregistrati.

Nemmen li l-akbar bidla li se tidhol fis-sehh hija dik li tissemma fi klawsola 23, fejn il-partiti politici rregistrati se jkunu obbligati li jirrapportaw lill-Kummissjoni Elettorali l-kisba u d-disponiment tal-fondi taghhom, u fejn il-Kummissjoni Elettorali tista` taghmel inkjesti fuq inizjattiva taghha stess. Fil-fatt, l-istess klawsola tkompli tghid li dawn l-inkjesti jistghu jwasslu sabiex il-Kummissjoni Elettorali tapplika numru ta` sanzjonijiet li jistghu jiehdu l-forma ta` espozizzjonijiet u osservazzjonijiet negattivi fil-pubbliku, jew sahansitra impozizzjonijiet ta` penali amministrattivi."

3 ta` Novembru 2014 : Tieni Qari
Onor. Censu Galea :

L-Onor. Paula Mifsud Bonnici, fid-diskors taghha ghamlet referenza ghall-fatt li hemm certi affarijiet li m`ghandhomx ikunu amministrati mill-Kummissjoni Elettorali. B`mod partikolari, hija qalet li m`ghandhiex tkun il-Kummissjoni Elettorali li taqdi r-rwol tal-kontroll jew l-amministrazzjoni tal-finanzi ta` partiti piolitici. Qalet ukoll li ghandu jkun il-Kummissarju dwar l-etika fil-politika jew xi isem iehor li jista` jkollu meta jitwaqqaf, li jiehu hsieb dan ix-xoghol u mhux il-Kummissjoni Elettorali. Fuq dan il-punt, jien naqbel ma` dak li qalet l-Onor. Mifsud Bonnici ghax nemmen li b`mod partikolari fic-cirkostanzi ta` pajjizna, li huwa pajjiz zghir fejn xi kultant il-politika tiehu livell iktar qawwi milli forsi wiehed jistenna, il-Kummissjoni Elettorali m`ghandhiex tkun hi li taghmel skrutinju fuq l-affarijiet ta` kuljum ta` partit politiku. Ghall-kuntrarju, il-Kummissjoni Elettorali b`serjetà ghandha tara l-andament kollu marbut mal-politiku fl-elezzjonijiet u tasssigura li kull min ghandu dritt jivvota jkun jista` jaqdi dan id-dmir."

3 ta` Novembru 2014 : Tieni Qari
Onor. Dr. Edward Zammit Lewis :

Sur President, nhar l-Erbgha l-Onor. Chris Said qal li minflok il-Kummissjoni Elettorali, ghandu jkun il-Kummissarju ghall-iStandards li jkun ir-regolatur. Jien nistaqsi jekk ahniex nitkellmu fuq l-istess ligi. Dan x`tahwid hu? Bir-rispett kollu, nafu x`qed nghidu? Kif nistghu ndahhlu regolatur iehor meta hemm il-Kummissjoni Elettorali li fl-iktar zmien importanti tal-elezzjonijiet u fl-iktar zmien kritiku ghad-demokrazija dejjem

taqdi dmirha. Sur President, int ghandek esperjenza vasta ghax ma nafx kemm-il elezzjoni kkontestajt. Il-Kummissjoni Elettorali ghandha track record tajjeb ghall-mod kif hadmet u digà hija vestita b`setghat li ghandhom x`jaqsmu mal-elezzjonijiet. Biss f`daqqa wahda donna jmissna niehdu l-parir tal-Onor. Chris Said li qed jghidilna li minn dak li ghedna m`hemm xejn u ghandna mmorru ghall- Kummissarju ghall-iStandards li, bir-rispett kollu, la ghandu rizorsi, la ghadu gie stabbilit u l-kompetenza tieghu lanqas ghandha x`taqsam mal-elezzjonijiet generali.

Jekk niehdu l-parir tal-Onor. Said, se jkollna sitwazzjoni ta` konvergenza ta` poteri. Fil-Kummissjoni Elettorali diga` hemm setghat li qeghdin hemm ghax il-poteri tal-Kummissjoni Elettorali ma johorgux biss minn dan l-Abbozz imma hemm ligijiet ohrajn li digà jaghtuha dawn il-poteri. Fil-fatt huwa tajjeb li nzidulha l-poteri u ahna hekk qed naghmlu. Il-Kummissjoni Elettorali mhijiex xi bord mahtur mill-Partit Laburista. Fil-prassi elettorali taghna, fil-Kummissjoni Elettorali hemm rapprezentanza soda tal-Oppozizzjoni, kif nixtiequ ahna, u zgur li m`ghandniex problema dwar dan.

Ahna rridu t-trasparenza u rridu naghtu aktar poteri lill-Kummissjoni Elettorali. Nixtieq insemmi l-punti saljenti kollha, però dan l-Abbozz huwa mimli poteri wiesgha lill-Kummissjoni Elettorali. Ahna nemmnu f`dan kollu u kien ghalhekk li l-kollega tieghi l-Onor. Owen Bonnici ghamel bicca xoghol tajba biex jara li jwessa` dawn il-poteri li ghandha l-Kummissjoni Elettorali."

<u>18 ta` Gunju 2015</u> : Kumitat
<u>Onor. Dr. Chris Said</u> :

Din il-klawsola tittratta dwar wahda mill-issues li ghandna f`dan l-Abbozz. Digà spjegajna – m`iniex se noqghod nirrepeti – li ghandna rizervi li l-Kummissjoni Elettorali tkun l-awtorità regolatorja fuq il-partiti politici. Bhala Oppozizzjoni, kellna l-opportunità li nispjegaw ir-ragunijiet ghalfejn, u ghamilna wkoll proposta ta` x`ghandu jsir, ghax ovvjament bilfors irid ikun hemm regolatur. Però, jrid ikun hemm regolatur li kulhadd ikollu l-fiducja fih. Bil-mod kif inhi ffurmata, u bil-mod ukoll kif tahdem il-Kummissjoni Elettorali, ahna m`ghandniex fiducja li tkun regolatur tajjeb fuq il-partiti politici. Allura, bla dubju ta` xejn se jkollna nirrizervaw li fi stadju ulterjuri nkunu nistghu nattakkaw dan l-artikolu tal-ligi f`fora ohra, ghax finalment hawnhekk, jekk il-Gvern irid jibqa` ghaddej, ghandu l-maggoranza biex jibqa` ghaddej u jghaddi din il-ligi. Però, dan ma jfissirx li ahna qed naccettaw li l-Kummissjoni Elettorali tkun ir-regolatur. Fl-opinjoni taghna, ir-Regolatur ghandu jkun ufficjal tal-Parlament maghzul b`zewg terzi tal-voti tal-Kamra u li jista` jitnehha wkoll b`zewg terzi tal-Kamra, u mhux tkun entità li fiha r-rapprezentanza tal-partiti li, mill-esperjenza li ghaddejna minnha matul numru ta` snin, nafu li dawn il-lealtà taghhom tkun lejn il-partiti li jinnominawhom."

18 ta` Gunju 2015 : Kumitat
Perit Carmel Cacopardo :

Naf li se nirrepeti dak li ghedt fis-seduti l-ohrajn, imma se nitkellem just for the record biex naghlaq l-input tieghi fuq dan l-artikolu. Kwazi l-istituzzjonijiet kollha f`dan il-pajjiz huma bbazati fuq strutturi bipartitici. Hija l-opportunità li niddistakkaw ruhna minn dan billi noholqu sistema li tinkorpora lil kulhadd u li tkun accettabbli ghal kulhadd. Huwa zball li ghandna din l-opportunità u qeghdin narmuha.

18 ta` Gunju 2015 : Kumitat
Ministru Onor. Dr. Owen Bonnici :

Kif ghedt l-ahhar darba, din hija kummissjoni li ilha hemmhekk is-snin. Ilha tiehu hsieb elezzjonijiet generali li huma affarijiet serjissimi, u nahseb li l-iktar decizjoni ghaqlija biex din il-ligi tidhol fis-sehh malajr u bla problemi hija li nuzaw xi haga li digà qieghda hemm, digà tiffunzjona, digà taghmel xoghol fil-qasam politiku, digà tahdem mal-partiti politici, u ghalhekk l-appell tieghi huwa li mmorru ghal iktar trasparenza, ghax kultant nibza` li ghadna ma fhimniex il-culture change enormi li din il-ligi se ggib maghha. Din hija ligi li qed tghid lill-partiti jifthu l-bibien, mhux jibzghu minn min imur jara x`ghandhom u m`ghandhomx, imma hija ligi li tmur favur il-kontabilità. Allura nitlob li jittiehed vot halli nimxu."

20 ta` Lulju 2015 : Tielet Qari
Onor. Dr. Simon Busuttil :

It-tieni ridna li r-rwol regolatorju f`din il-ligi ma jigix fdat f`idejn il-Kummissjoni Elettorali li digà hija dominata mill-partiti politici, imma jigi fdat f`idejn istituzzjoni pubblika li mhijiex influwenzata mill-partiti politici, bhal perezempju l-Ufficcju tal-Awditur Generali…Sur President, kif digà ghedt l-Oppozizzjoni se tivvota favur din il-ligi izda minhabba r-rizervi li ghandna qed niddikjaraw minn issa li se nkunu qeghdin nevalwaw is-sitwazzjoni u lesti niehdu wkoll passi legali biex nassiguraw li dawn l-anomaliji li semmejt jigu indirizzati u biex il-partiti politici f`pajjizna tassew jigu ttrattati l-istess mill-Istat.

20 ta` Lulju 2015 : Tielet Qari :
Onor. Prim Ministru :

It-tieni punt huwa dak fir-rigward tal-Kummissjoni Elettorali. Sur President, l-aktar mumenti delikati fid-demokrazija taghna huma l-mumenti meta n-nies jintalbu jivvotaw f`elezzjoni generali. F`dawk il-mumenti l-partiti kollha jhallu f`idejn organu li qieghed imfisser fil-Kostituzzjoni taghna biex jiddeciedi hu l-affarijiet li ghandhom x`jaqsmu mal-elezzjonijiet. Jekk kemm-il darba lill-Kummissjoni Elettorali nafdawlha l-elezzjonijiet f`idejha,

m`ghandniex nafdawlha wkoll il-kwestjoni li ghandha x`taqsam mal-finanzjament tal-partiti politici?"

Meqjus b`reqqa dan kollu, din il-Qorti tqis illi l-Kummissjoni Elettorali hija mwaqqfa bil-Kostituzzjoni, b`ghanijiet stabbiliti mil-Kostituzzjoni stess, u hija organu indipendenti u mparzjali li joffri l-garanziji mehtiega.

Il-Qorti tishaq illi fil-kaz tal-lum ma tressqux provi maghmula minn fatti oggettivi, accertati u relevanti li b`xi mod ixejnu l-fehma taghha.

Ghalhekk il-Qorti qeghda <u>tichad</u> l-ewwel talba.

VI. <u>It-tieni (2) it-tielet (3) u r-raba` (4) talbiet</u>

1. <u>X`qed jintalab</u>

Ir-rikorrenti talbu dikjarazzjoni mill-qorti illi l-process innifsu, indipendentement minn kull decizjoni li tista` tittiehed, jammonta ghal ksur tal-Art 39 tal-Kostituzzjoni u tal-Art 6 tal-Konvenzjoni ghaliex il-process jista` jwassal ghal kundanna meqjusa bhala ta` natura penali u qed jitmexxa minn korp li mhuwiex *qorti*.

Qeghda tintalab ukoll dikjarazzjoni li l-process innifsu kif immexxi mill-Kummissjoni Elettorali bhala bord li jiddeciedi u jissanzjona minghajr garanziji ta` indipendenza u imparzjalita kif mehtieg fid-dritt ghal smigh xieraq jammonta ghal ksur tal-Art 39 tal-Kostituzzjoni u tal-Art 6 tal-Konvenzjoni.

Inoltre talbu dikjarazzjoni li in kwantu l-Kummissjoni Elettorali ghandha l-poter li ssejjah ufficjali tal-Partit rikorrent sabiex jaghtuha informazzjoni, dan il-process jesponi lil Partit rikorrent, u anke lill-ufficjali tieghu ghal akkuzi, gudizzju u sanzjonijiet ta` natura penali minghajr ma joffrilhom is-salvagwardi tad-dritt ghal smigh xieraq bi ksur tal-Art 39 tal-Kostituzzjoni u tal-Art 6 tal-Konvenzjoni.

Il-Qorti sejra tqis dawn it-tliet talbiet flimkien.

2. Differenzi

Stabbilit illi s-sanzjonijiet huma ta` natura penali ghar-ragunijiet imfissra aktar kmieni, il-process ghandu jitmexxa skont l-Art 39(1) tal-Kostituzzjoni ta` Malta minn *qorti,* filwaqt li skont l-Art 6 tal-Konvenzjoni decizjoni dwar akkuza kriminali tista` tittiehed minn *tribunal indipendenti u imparzjali mwaqqaf b`ligi.*

Din il-Qorti tqis illi ghal dak li jirrigwarda l-Art 39(1) tal-Kostituzzjoni dak li jrid jigi determinat huwa jekk il-Kummissjoni Elettorali hijiex *qorti,* waqt li ghal dak li jirrigwarda l-Art 6 tal-Konvenzjoni l-kwistjoni hija jekk il-Kummissjoni Elettorali tistax titqies bhala *tribunal jew awtorita` ohra imparzjali u indipendenti.*

3. *Qorti* ghall-fini tal-Art 39(1) tal-Kostituzzjoni

L-Art 39(1) tal-Kostituzzjoni jitlob illi akkuza kriminali tinstema` quddiem *qorti.*

Tribunal, ukoll jekk imparzjali, indipendenti u mwaqqaf b`ligi, ma huwiex *qorti.*

Fis-sentenza fil-kawza **Federation of Estate Agents vs Direttur Generali (Kompetizzjoni) et** (op. cit.) l-Ewwel Qorti qalet hekk :-

> *Meta l-Kostituzzjoni ssemmi il-Gudizzjarju taht il-Kap. VIII minn art. 95 `il quddiem, issemmi biss il-Qrati Superjuri preseduti minn imhallef u Qrati Inferjuri ppreseduti minn magistrati. La jissemmew tribunal u lanqas presidenti jew chairmen ta` tribunali …*
>
> *Minn ghamel il-Kostituzzjoni bil-kelma qorti ried ifiehem biss Qorti Superjuri jew Qorti Inferjuri … u minn hadd izjed …"*
>
> *Vide* ***Montalto v. Clews noe et*** *deciza fis-26 ta` Mejju 1987 mill-Prim`Awla, Sede Kostituzzjonali; vide wkoll* ***Kummissarju tal-Artijiet v. Ignatius***

Licari noe *deciza fit-30 ta` Gunju 2004 mill-Qorti Kostituzzjonali.*

Il-Qorti Kostituzzjonali affermat :-

> *Meta mbaghad l-ewwel qorti, meta giet biex tinterpreta l-kelma "qorti", qaghdet "rigorozament ma` dak li hemm imnizzel fil-ligi" flok fittxet "tifsira awtonoma" tal-kelma, dan huwa perfettament gustifikat bil-fatt illi fl-art. 39(1) il-Kostituzzjoni tghid illi dwar akkuzi kriminali ghandu jkun hemm smigh quddiem "qorti indipendenti u imparzjali" waqt illi, dwar decizjonijiet li jolqtu drittijiet civili, taht l-art. 39(2) huwa bizzejjed li l-kaz jinstema` minn "qorti jew awtorità ohra gudikanti mwaqqfa b`ligi". Huwa ovvju mill-kliem tal-art. 39(1) u (2) illi l-Kostituzzjoni ma tifhimx illi l-kelma "qorti" tinkludi wkoll "awtorità ohra gudikanti". Interpretazzjoni ohra tirrendi superfluwi l-kelmiet "jew awtorità ohra gudikanti" fl-art. 39(2) u ghalhekk ma tkunx interpretazzjoni korretta. Il-kelma "qorti" ghalhekk ma tistax ma tfissirx hlief qorti fis-sens klassiku tal-kelma. »*

Fuq l-istess linja kienet is-sentenza li tat il-Qorti Kostituzzjonali fid-29 ta` Frar, 2008 fil-kawza fl-ismijiet **Anthony Grech v. Claire Calleja et** fejn inghad :

> *Dan il-punt kien diga` gie deciz minn din il-Qorti, kif illum komposta, fit-30 ta` Gunju 2004 fil-kawza li ghaliha rrefera l-appellant u cioe` **Kummissarju ta` l-Artijiet v. Ignatius Licari noe**. F`dik is-sentenza inghad hekk :*
>
> *"Kif tajjeb gie osservat fis-sentenza appellata, hemm zewg interpretazzjonijiet li jistghu jinghataw lill-kelma "qorti" – wahda li tillimita din il-kelma ghal dawk l-organi li jiffurmaw parti mill-istruttura gudizzjarja ordinarja (u li huma dejjem presjeduti minn Imhallef jew minn Magistrat), u ohra li testendi din il-kelma ghal kull organu (li jista` jissejjah anke "tribunal", "bord", "kummissjoni", "panel" ecc.) li ghandu certa funzjoni aggudikanti simili ghal dik ta` organu li jissejjeh "qorti" u li jifforma parti mill-istruttura gudizzjarja ordinarja*

kif inghad. Pero` wiehed ma jistax jargumenta li, ghax tali organu ghandu l-istess funzjoni, jew funzjoni simili ghal dik, ta` "qorti" allura dak l-organu hu "qorti" ghall-fini tas-subartikolu (3) tal-Artikolu 46 tal-Kostituzzjoni u l-artikolu korrispondenti tal-Kap. 319.

Wiehed irid jiddistingwi jekk il-kwistjoni li tkun qed tigi diskussa hix jekk tali organu hux "imparzjali w indipendenti" u/jew jekk jissodisfax ir-rekwiziti sostantivi ta` xi wiehed jew aktar mill-artikoli tal-Kostituzzjoni jew tal-Konvenzjoni li jiggarantixxu xi dritt partikolari, jew jekk il-kwistjoni hix prettament wahda procedurali biex jigi determinat jekk, ghall-finijiet ta` disposizzjoni partikolari – Art. 46(3) – dak l-organu hux "qorti" fis-sens tas-subartikolu (1) tal-Artikolu 47. Din il-Qorti ezaminat is-sentenzi kollha msemmija fis-sentenza appellata u, hlief ghal ***Il-Pulizija v. Emanuel Vella*** *(Qorti Kostituzzjonali, 28 ta` Gunju, 1983) u* ***Kummissarju ta` l-Art v. Violet Briffa et*** *(Prim Awla, 19 ta` Gunju, 2003), ebda wahda minnhom ma tindirizza l-punt procedurali tat-tifsira ta` "qorti" ghall-finijiet tal-Artikolu 46(3) izda jitrattaw kollha dwar jekk l-organu li dwaru kien hemm l-ilment kienx wiehed li jaqa` fid-definizzjoni ta` xi wiehed jew aktar mid-disposizzjonijiet sostantivi li jipprotegu dritt fondamentali (taht il-Kostitizzjoni jew taht il-Konvenzjoni). Bid-dovut rigward lejn l-ewwel Qorti, din mhix kwistjoni ta` "pratticita`" in konfront ma` "…l-intralc zejjed precipitat minn interpretazzjonijiet rigidi u stretti ta` l-ittra preciza tal-ligi u formalitajiet procedurali esasperanti." Hawn qeghdin fil-kamp tal-procedura fejn m`ghandux ikun hemm lok ta` interpretazzjonijiet innovattivi li jiddipartixxu mill-kliem car tal-ligi, ghax altrimenti mhux biss tinholoq l-incertezza ghall-partijiet, izda wkoll facilment tista` tinbet l-arbitrarjeta` f`idejn l-organi gudizzjarji.*

"Fil-fehma ta` din il-Qorti il-kwistjoni hi, fil-verita`, wahda semplici. Ghalkemm fil-Kapitolu IV tal-Kostituzzjoni l-legislatur juza il-kliem "qorti", "tribunal" u "awtorita` gudikanti" (ez. Artikoli 34(1)(c)(d), 37(1)(b), 39(1)(2)), hu evidenti li dawn il-kliem ma ghandhomx l-istess tifsira.

Dan jirrizulta bl-aktar mod car mill-Artikolu 39. Hekk, filwaqt li ghal dak li ghandu x`jaqsam ma` akkuza ta` reati kriminali persuna ghandha tigi processata minn "qorti" – subartikolu (1) – meta si tratta ta` decizjoni "dwar l-ezistenza jew l-estensjoni ta` drittijiet jew obbligi civili" l-organu (li xorta wahda jrid ikun indipendenti w imparzjali) jista` jkun jew "qorti" jew "awtorita` ohra gudikanti" – subartikolu (2). Kif gie mfisser minn din il-Qorti, diversament komposta, fis-sentenza fl-ismijiet* ***Il-Pulizija v. Emanuel Vella*** *(aktar `l fuq imsemmija):

"Tohrog wahedha l-konkluzjoni, ghalhekk, li skond il-Kostituzzjoni t-termini "qorti" u "tribunal" jew "awtorita` ohra gudikanti" m`humiex ekwipollenti u ma jintuzawx indiskriminatament wiehed ghall-iehor.

Meta trid tfisser "tribunal" jew "awtorita` ohra gudikanti", il-Kostituzzjoni tghidu, u ghalhekk meta tuza t-terminu "qorti" wahdu ma nistghux nestendu ssinjifikat ta` din il-kelma anke ghal dak li mhux qieghed jigi nkluz u li meta riedet tinkludih il-Kostituzzjoni inkludietu…Il-Kostituzzjoni fl-artikolu 48(1)5 tghid ukoll li ghall-finijiet tal-interpretazzjoni tal-Kapitolu IV, li jirrigwarda d-drittijiet u libertajiet fondamentali tal-individwu…il-kelma "qorti" tfisser kull qorti f`Malta li ma tkunx qorti mwaqqfa bi jew skond ligi dixxiplinarja, u fl-artikoli 34 u 366 tal-Kostituzzjoni tinkludi, dwar reat kontra ligi dixxiplinarja, qorti hekk imwaqqfa. Din id-definizzjoni turi bic-car li min ghamel il-Kostituzzjoni, wara li, kif gia` spjegat, iddistingwa bejn "qorti" u "tribunal" u "awtorita` ohra gudikanti", kompla jaghmel din id-distinzjoni meta ddefinixxa l-kelma "qorti" billi ma nkludiex fiha la tribunal u l-anqas awtorita` ohra gudikanti, kif kien wisq naturali jaghmel kieku ried jaghti lill-kelma "qorti" sinjifikat estensiv b`mod li tinkludi wkoll "tribunal" jew "awtorita` ohra gudikanti". Din il-Qorti, ghalhekk, ma tistax taqbel ma` dak li qalet l-ewwel Qorti fis-sentenza appellata li l-kelma "qorti" tinkludi kull forma ta` tribunal jew post fejn il-gustizzja tigi amministrata.

"Din il-Qorti, kif illum komposta, taqbel perfettament ma` din is-silta mis-sentenza ta` Emanuel Vella. Din il-Qorti zzid tosserva a propositu li hu evidenti li meta, fid-definizzjoni ta` "qorti" moghtija fl-Artikolu 47(1) il-legislatur jirreferi ghal "qorti mwaqqfa bi jew skond ligi dixxiplinari" kien qed jirreferi ghall-qrati marzjali, b`mod ghalhekk li tali qorti tista` – jew ahjar kienet tista` – tikkundanna lil xi hadd ghall-mewt minhabba li jkun ikkommetta reat kontra l-ligi dixxiplinarja applikabbli (Art. 33(1)), kif ukoll tista` tikkundanna lil dak li jkun ghal xoghol furzat (Art. 33(2)(a)(b)). Qorti marzjali, izda, xorta wahda ma tistax taghmel referenza fir-termini tal-Artikolu 46(3) proprju ghax l-estensjoni tal-kelma "qorti" biex tinkludi "qorti marzjali" hi limitata ghall-Artikoli 33 u 35.

"Issegwi, ghalhekk, il-mistoqsija: liema organi jammontaw ghal "qrati" (eccetwati l-qrati marzjali) fis-sens taddefinizzjoni kontenuta fl-Artikolu 47(1) tal-Kostituzzjoni? Ir-risposta nghatat minn din il-Qorti, diversament komposta, fis-sentenza ta` Emmanuel Vella:

""Minn ezami ta` din it-Taqsima [Kapitolu VIII – Il-Gudizzjarju] jidher li l-Kostituzzjoni qieghda tikkontempla zewg xorta ta` Qrati – il-Qrati Superjuri u l-Qrati Inferjuri. Din id-distinzjoni maghmula mill-Kostituzzjoni taqbel mad-distinzjoni li kienet giet introdotta ghall-ewwel darba fil-bidu ta` l-okkupazzjoni Ingliza f`Malta mill-ewwel Gvernatur Ingliz Sir Thomas Maitland, u tinsab fil-Kodici ta` Organizzazzjoni u Procedura Civili kif ukoll fil-Kodici Kriminali. L-istess Taqsima, imbghad, tirriferixxi ghall-Imhallfin tal-Qrati Superjuri u tiddisponi dwar il-hatra u t-tizmim tal-kariga taghhom. It-taqsima tirriferixxi imbaghad ghall-Magistrati tal-Qrati Inferjuri u tiddisponi dwar il-hatra taghhom u tapplika ghalihom id-disposizzjonijiet rigwardanti t-tizmim tal-kariga ta` Mhallef. Jidher car mill-kumpless tad-disposizzjonijiet ta` din it-Taqsima li minn ghamel il-Kostituzzjoni bil-kelma "Qorti" ried jifhem biss "Qorti Superjuri" jew "Qorti Inferjuri"…

"Din il-Qorti ma tara li ghandha b`ebda mod tiddipartixxi minn dan l-insenjament. L-organi gudizzjarji ordinarji huma dawk li jikkwalifikaw bhala jew Qorti Superjuri jew Qorti Inferjuri fit-termini tal-Kodici ta` Organizzazzjoni u Procedura Civili, u huwa ghal dawn il-"qrati" li l-legislatur qed jirreferi fl-Artikoli 46(3) u 47(1) tal-Kostituzzjoni (eccettwati dejjem il-qrati marzjali limitatament ghall-Artikoli 33 u 35). Din id-differenza bejn l-dawk l-organi li jiffurmaw parti mill-istruttura gudizzjarja ordinarja u dawk l-organi l-ohra li, ghalkemm jamministraw il-gustizzja (u jistghu anke jissejhu "qrati"), ma jiffurmawx hekk parti giet senjalata minn din il-Qorti, ukoll diversament komposta, fis-sentenza taghha tat-3 ta` Dicembru, 1997 fl-ismijiet ***Cecil Pace et v. Onorevoli Prim Ministru et*** *fejn inghad hekk :*

"Tribunal jew, kif grafikament espress fil-Kostituzzjoni, "awtorita` gudikanti" imwaqqfa b`ligi biex ikun jista` jikkwalifika bhala tali jehtieg li jkun karatterizzat bil-fatt li jkun korp b`funzjoni gudizzjarja bil-fakolta` li jiddetermina u jiddeciedi materji li skond dik il-ligi jaqghu fil-kompetenza tieghu. Hu korp li jehtieg li jipprocedi skond ir-regoli precizi u ben stabbiliti fil-ligi li tikkostitwih u li jiddecidi skond dawk ir-regoli. Ghandu jkollu l-poter li jorbot lill-partijiet li jidhru quddiemu in kontestazzjoni u d-decizjoni tieghu jehtieg allura li jkollha effett vinkolanti anke jekk mhux neccessarjament b`mod finali. Mill-banda l-ohra dan il-korp mhux bilfors – kif gia accennat – ghandu jkun jifforma parti mill-istruttura gudizzjarja ordinarja pero` jrid jinkorpora fih dawk il-karatteristici fondamentali assocjati mal-process gudizzjarju li jkunu jiggarantixxu s-smigh xieraq fosthom dak il-minimu ta` indipendenza u imparzjalita` essenzjali biex juru li mhux biss il-gustizzja tkun qed issir sewwa u kif mistenni imma li jkun hemm jidher fid-dieher li jkun qed isir.

L-Art 95(1) tal-Kostituzzjoni jghid :-

Ghandu jkun hemm f`Malta u ghal Malta dawk il-Qrati Superjuri li jkollhom dawk is-setghat u

gurisdizzjoni kif ikun provdut b`xi ligi li ghal dak iz-zmien tkun issehh f`Malta.«

L-Art 99 tal-Kostituzzjoni jghid l-istess dwar il-qrati inferjuri.

Hemm imbaghad l-Art 3 u 4 tal-Kap 12.

Ladarba l-proceduri skont il-Kap 544 ghandhom min-natura ta` akkuza kriminali, ighodd ghalihom l-Art 39(1) tal-Kostituzzjoni u ghalhekk ghandhom jitmexxew quddiem *qorti*, hekk kif fuq delineata.

Tinsorgi l-kwistjoni ta` jekk il-materja kenitx indirizzata b`mod risoluttiv bil-fatt li skont l-Art 44(2) tal-Kap 544, partiti politici u kull persuna interessata tista` tikkontesta kull sejbien ta` nuqqas ta` tharis tad-disposizzjonijiet tal-Kap 544 kif ukoll l-impozizzjoni ta` penali jew sanzjonijiet imposti mill-Kummissjoni billi tipprezenta rikors guramentat quddiem il-qrati ordinarji fi zmien tletin (30) jum mill-impozizzjoni tal-multa jew sanzjoni.

Testwalment id-disposizzjoni tghid hekk :-

Partiti politici u persuni ohra interessati jistghu jirribattu l-argument ta` xi ksur tad-dispozizzjonijiet ta` dan l-Att u l-impozizzjoni ta` multi amministrattivi u sanzjonijiet mill-Kummissjoni fil-Prim` Awla, Qorti Civili, permezz ta` rikors guramentat ipprezentat fi zmien tletin (30) jum mill-impozizzjoni ta` multa jew sanzjoni bhal dik :

Izda d-dispozizzjonijiet tal-Kodici ta` Organizzazzjoni u Procedura Civili ghandhom japplikaw ghal dan ir-rikors guramentat.

Il-kwistjoni kienet trattata mill-Qorti Kostituzzjonali fis-sentenza li tat fil-kawza **Federation of Estate Agents vs Direttur Generali (Kompetizzjoni) et** (op. cit.)

Hemm il-Qorti kkonkludiet li huwa minnu li l-process kollu dwar akkuza kriminali ghandu jsir quddiem qorti u li fl-ebda grad ma tista` tinghata sentenza, jew anke jsir smigh, dwar akkuza kriminali minn organu li ma jkunx qorti.

U ziedet tghid hekk :-

> *F`kull kaz, izda, ukoll jekk jitqies bizzejjed li xi gradi tal-process jitmexxa quddiem qorti, jibqa` l-fatt illi appell quddiem il-Qorti tal-Appell jista` jsir biss fuq punt ta` ligi, u ghalhekk jigri illi sentenza fuq akkuza kriminali tigi maqtugha fuq konsiderazzjonijiet ta` fatt li d-decizjoni dwarhom ma tkunx ittiehdet minn qorti u ma tkunx soggetta ghal revizjoni minn qorti.*

Ghalhekk il-Qorti Kostituzzjonali cahdet l-aggravvju safejn kien jolqot l-Art 39 tal-Kostituzzjoni.

Fil-kaz odjern, din il-Qorti tqis li d-dritt ghal access ghal qorti jista` jsir kemm fuq punti ta` dritt kif ukoll fuq punti ta` fatt.

Ma kienx dak il-kaz li kellha quddiemha l-Qorti Kostituzzjonali fil-kawza <u>Federation of Estate Agents vs Direttur Generali (Kompetizzjoni) et.</u>

Din il-Qorti tqis illi ladarba japplikaw id-disposizzjonijiet tal-Kap 12 ghall-procedura quddiem il-Kummissjoni Elettorali, ifisser li l-procedura quddiem il-Kummissjoni Elettorali <u>mhijiex</u> finali u konklussiva ghaliex wara li tiddeciedi l-Kummissjoni Elettorali jista` jitressaq rikors guramentat quddiem il-Prim` Awla tal-Qorti Civili li minnu hemm ukoll appell quddiem il-Qorti ta` l-Appell.

Fil-fehma ta` din il-Qorti, ladarba il-procediment huwa kompost minn varji gradi li jinvolvi wkoll il-qrati ordinarji sal-oghla grad ta` appell, allura huwa sodisfatt ir-rekwizit ta` *qorti* fil-kuntest tal-Art 39(1) tal-Kostituzzjoni.

Ghalhekk il-Qorti qeghda <u>tichad</u> it-tieni (2) talba fejn din tirrigwarda l-Art 39(1) tal-Kostituzzjoni.

Bhala konsegwenza, u ghall-istess ragunijiet, il-Qorti qeghda <u>tichad</u> it-tielet (3) u r-raba` (4) talbiet safejn dawn jirrigwardaw l-Art 39(1) tal-Kostituzzjoni.

Bhala konsegwenza, u ghall-istess ragunijiet, il-Qorti qeghda tichad it-tielet (3) u r-raba` (4) talbiet safejn dawn jirrigwardaw l-Art 39(1) tal-Kostituzzjoni.

4. Il-kuntest tal-Art 6 tal-Konvenzjoni

Fil-kaz tal-Art 6 tal-Konvenzjoni, ma huwiex mehtieg illi kull decizjoni ta` kundanna f`kull grad tal-process dwar ksur tal-ligi tal-finanzjament tal-partiti tkun ittiehdet minn tribunal indipendenti u imparzjali, sakemm dik id-decizjoni tkun tista` tigi finalment sindakata minn tribunal li jkollu dawk il-kwalitajiet.

Din il-Qorti taghraf li l-gurisprudenza tal-ECHR bhal donnha turi caqlieq li jista` jindika li ma takkordax il-protezzjoni u garanziji stretti hafna tal-Kostituzzjoni ta` Malta bl-Art 39(1).

Il-Qorti taghmel riferenza ghall-paragrafu 43 tad-decizjoni tal-ECHR fil-kaz ta` **Jussila v. Finland** fejn inghad :

> *There are clearly `criminal charges` of differing weight. What is more, the autonomous interpretation adopted by the Con-vention institutions of the notion of a `criminal charge` by apply-ing the Engel criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example admin-istrative penalties (**Ozturk**, cited above), prison disciplinary pro-ceedings (**Campbell and Fell v. the United Kingdom**, 28 June 1984, Series A no. 80), customs law (**Salabiaku v. France**, 7 October 1988, Series A no. 141-A), competition law (**Société Stenuit v. France**, 27 February 1992, Series A no. 232-A), and penalties imposed by a court with jurisdiction in financial matters (**Guisset v. France**, no 33933/96, ECHR 2000-IX). Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necess-arily apply with their full stringency (see **Bendenoun** and **Janosevic**, § 46 and § 81 respectively, where it was found compatible with article 6 § 1 for criminal penalties to be imposed, in the first instance, by an*

administrative or non-judicial body, and, a contrario, ***Findlay****, cited above).”*

Fost il-proceduri jew pieni li huma ta` natura penali ghall-ghanijiet tal-Art 6 tal-Konvenzjoni ghandha ssir distinzjoni bejn kazi ta` *hard core of criminal law* u kazi *not strictly belonging to the traditional categories of the criminal law*. Kazi taht l-ahhar kategorija ma jistghux jitqiesu bhala *hard core of criminal law*, b`dana li huwa accettat li ghandu jkun hemm certa flessibilità tal-garanziji ta` Konvenzjoni li generalment huma applikabbli ghal *hard core cases of criminal law*.

Ghad illi din il-Qorti tapprezza illi l-offizi kontemplati fil-Kap. 544 ma jistghux necessarjament jitqiesu bhala “*hard core criminal law*”, jibqghu ta` bixra kriminali, li jfisser illi ghalkemm mhuwiex necessarju ghal Stati Membri tal-Konvenzjoni li jimxu b`rigorozità mal-garanziji akkordati fi proceduri purament u intrinsikament kriminali, l-Istati Membri ghandhom xorta wahda josservaw is-salvagwardji li ssemmi l-gurisprudenza tal-ECHR.

Din il-Qorti taghmel taghha dak li qalet il-Qorti Kostituzzjonali fil-kawza **Federation of Estate Agents vs Direttur Generali (Kompetizzjoni) et** (op. cit.) dwar dan l-aspett.

Tghid hekk :-

Kaz illi ghandu analogija mal-kaz tallum u li ghalhekk jista` jservi ta` gwida, ghalkemm, kif tghid il-Federazzjoni, ma kienx kaz ta` kompetizzjoni, huwa il-kaz ta` ***Janosevic v. l-Isvezja****. Dak ukoll kien kaz ta` multa – taxxa addizzjonali – imposta minn awtorità amministrattiva – awtorità tat-taxxi – li kellha s-setgha tixli, tinvestiga u tiddeciedi, u li, ghalkemm seta` jsir appell mid-decizjoni taghha, dik id-decizjoni kienet esegwibbli minnufih wara li tinghata, ukoll qabel ma jinstema` u jinqata` l-appell.*

44. Il-Qorti Ewropea tad-Drittijiet tal-Bniedem, wara li qieset illi l-proceduri dwar it-taxxa addizzjonali kellhom min-natura ta` proceduri dwar akkuza kriminali, ukoll fid-dawl ta` “the

severity of the potential and actual penalty" kompliet hekk :

81. The Court notes that the basis for the various proceedings in the present case is the Tax Authority`s decisions … … … which imposed additional taxes and tax surcharges on the applicant. The tax authorities are administrative bodies which cannot be considered to satisfy the requirements of Article 6 § 1 of the Convention. The Court considers, however, that Contracting States must be free to empower tax authorities to impose sanctions like tax surcharges even if they come to large amounts. Such a system is not incompatible with Article 6 § 1 so long as the taxpayer can bring any such decision affecting him before a judicial body that has full jurisdiction, including the power to quash in all respects, on questions of fact and law, the challenged decision (see ***Bendenoun v. France****, judgment of 24 February 1994, Series A no. 284, pp. 19-20, § 46, and* ***Umlauft v. Austria****, judgment of 23 October 1995, Series A no. 328-B, pp. 39-40, §§ 37-39).«*

45. Dak li jghodd ghall-awtorità tat-taxxa jghodd ukoll ghall-awtorità tal-kompetizzjoni u l-qorti taqbel mal-Appellanti illi l-fatt illi l-multa tigi imposta, fl-ewwel grad, minn awtorità amministrattiva li ma hijiex tribunal indipendenti u imparzjali ma huwiex inkompatibbli mal-art. 6 tal-Konvenzjoni, sakemm id-decizjoni ta` dik l-awtorità tista` tingieb ghal revizjoni quddiem tribunal b`dawk il-kwalitajiet u li jkollu "gurisdizzjoni shiha" fuq il-kwistjonijiet kollha, kemm ta` fatt kif ukoll ta` ligi.

Ghalhekk huwa biss jekk ma jezistix dritt ta` appell mid-decizjoni tal-organu amministrattiv li wiehed jista` jitkellem dwar ksur potenzjali tal-jedd ta` smigh xieraq.

Bil-kontra jekk, skont il-ligi ordinarja, wiehed ikun jista` jattakka decizjoni amministrattiva quddiem organu gudizzjarju, allura m`ghandhiex tinsorgi kwistjoni ta` ksur ta` jedd ta` smigh xieraq.

Fil-kaz odjern, mhux kontestat illi meta tigi adottat l-procedura stabbilita fl-Art 44(2) tal-Kap 544, il-qrati ordinarji jkollhom gurisdizzjoni shiha.

Huwa minnu li - kif jargumentaw ir-rikorrenti illi l-gurisprudenza tal-ECHR trid illi "*sanctions must be imposed at first instance by an independent and impartial tribunal fulfilling all the requirements of Article 6 ECHR*" u dan in linea ma` dak li ntqal fis-sentenza ta` **Jussila v. il-Finlandja** tat-23 ta` Novembru 2006.

Il-Qorti ticcita minn din tal-ahhar :-

> *40. This principle [kompatibilità mal-art. 6] is particularly important in the criminal context, where generally there must be at first instance a tribunal which fully meets the requirements of Article 6 (see **Findlay v. the United Kingdom,** 25 February 1997, § 79, Reports of Judgments and Decisions 1997-I), and where an applicant has an entitlement to have his case "heard", with the opportunity, inter alia, to give evidence in his own defence, hear the evidence against him, and examine and cross-examine the witnesses.*

Eppure kif qalet il-Qorti Kostituzzjonali fil-kawza **Federation of Estate Agents vs Direttur Generali (Kompetizzjoni) et** (op. cit.) :

> *Ir-referenza ghall-para. 79 tas-sentenza fil-kaz ta` **Findlay**, izda, turi illi dan il-principju japplika meta l-akkuza titqies kriminali mhux biss fit-"tifsira awtonoma" ghall-ghanijiet tal-Konvenzjoni izda wkoll taht il-ligi domestika :*
>
> *79. Nor could the defects referred to above [nuqqas ta` indipendenza tat-tribunal] be corrected by any subsequent review proceedings. Since the applicant`s hearing was concerned with serious charges classified as "criminal" under both domestic and Convention law, he was entitled to a first-instance tribunal which fully met the requirements of Article 6 para. 1 (art. 6-1) (see the **De Cubber v. Belgium** judgment of 26 October 1984, Series A no. 86, pp. 16-18, paras. 31-32).*

*48. Fil-kaz ta` **De Cubber** il-principju tqies illi japplika ghax "in the present case … … … what was involved was a trial which not only the Convention but also Belgian law classified as criminal".*

*Fil-kaz tal-lum, fejn il-proceduri dwar ksur tal-ligi tal-kompetizzjoni ma ghadhomx, taht il-ligi domestika, jitqiesu ta` natura kriminali, japplika, minflok, il-principju ta` **Janosevic** illi decizjoni fl-ewwel grad mehuda minn awtorità amministrattiva "… … … is not incompatible with Article 6 § 1 so long as the taxpayer can bring any such decision affecting him before a judicial body that has full jurisdiction".*

Din il-Qorti tqis illi bil-fatt illi d-decizjoni tal-Kummissjoni Elettorali fil-kuntest tal-mertu tal-kaz prezenti tista` tigi gudizzjarjament ikkontestata quddiem il-qrati ordinarji ma hemmx ksur tal-Art 6 tal-Konvenzjoni.

Il-fatt li s-sanzjoni tigi mposta fl-ewwel grad minn awtorita` amministrattiva li ma hijiex tribunal mhuwiex inkompatibbli mal-Art 6 tal-Konvenzjoni, dment illi d-decizjoni ta` dik l-awtorità tista` tingieb ghal revizjoni quddiem tribunal li ghandu l-kwalitajiet u li jkollu "gurisdizzjoni shiha" dwar il-kwistjonijiet kollha, kemm ta` fatt kif ukoll ta` dritt.

Riferibbilment ghall-kaz tal-lum, ir-revizjoni tista` ssehh mill-Prim` Awla tal-Qorti Civili li ghandha "gurisdizzjoni shiha"; ghandha ukoll il-garanziji moghtija mil-ligi dwar l-indipendenza taghha, liema garanziji huma qawwija bizzejjed kemm fid-dehra u kemm fis-sustanza biex ma jhallu ebda dubju dwar l-indipendenza u imparzjalità, kemm soggettiva u kemm oggettiva, tal-Qorti.

Din il-Qorti ma tqisx li d-dritt ghal kontestazzjoni ma jammontax ghal dritt ta` appell.

Il-fatt li ma tintuzax il-kelma *appell* ma jaghmilx id-dritt stabbilit fl-Art 44(2) tal-Kap 544 bhala xi haga anqas minn appell.

L-ghan ta` dan l-artikolu huwa li tigi kkontestata d-decizjoni jew sanzjoni moghtija mill-Kummissjoni Elettorali.

Ghalhekk il-Qorti jkollha gurisdizzjoni shiha li tisma` l-kaz.

Il-Qorti qeghda tichad it-tieni (2) it-tielet (3) u r-raba` (4) talbiet tar-rikorrenti safejn dawn jikkoncernaw l-Art 6 tal-Konvenzjoni.

VII. Il-hames (5) talba

Ir-rikorrenti talbu dikjarazzjoni li in kwantu l-Partit rikorrent tqieghed taht investigazzjoni izda ma rcieva l-ebda tahrika jew akkuza li tindikalu liema hu r-reat li ghalih qieghed jigi investigat jammonta ghal ksur tal-Art 39 tal-Kostituzzjoni u tal-Art 6 tal-Konvenzjoni billi ma jistghux jigu assikurati l-garanziji li d-dritt ghal smigh xieraq igib mieghu.

Din il-Qorti tqis li l-process li jirrigwarda lir-rikorrenti ghadu fl-istadju ta` investigazzjoni.

Il-Kummissjoni qed tigbor l-informazzjoni biss.

Ghalhekk ma hemmx kwistjoni ta` tahrika jew ta` akkuza.

Fil-kaz odjern, il-Kumissjoni Elettorali ma hadet l-ebda decizjoni li tiehu passi kontra l-partit politiku rikorrenti imma biss li tevalwa u tikkonsidra x`kienu c-cirkostanzi tal-kaz biex imbaghad tara kif ghandha tagixxi u timxi.

Huwa biss, wara li tkun saret l-investigazzjoni, li tasal sabiex tikkonkludi li kien hemm kaz li ghalih il-partit politiku kellu jaghti spjegazzjoni, dak il-partit politiku jigi mbaghad infurmat u mitlub iwiegeb qabel tittiehed decizjoni.

Huwa biss wara li tkun konkluza l-investigazzjoni li l-partit koncernat jinghata l-opportunita` li jressaq il-provi tieghu, u li jiddefendi ruhu, qabel ma tinghata d-decizjoni.

Ghalhekk il-hames (5) talba qeghda tkun respinta.

VIII. Is-sitt (6) talba

Ir-rikorrenti talbu dikjarazzjoni illi in kwantu l-Kummissjoni Elettorali hatret terzi persuni sabiex iwettqu l-investigazzjoni li skont l-Att dwar il-Finanzjarjament tal-Partiti Politici hija funzjoni li tispetta lilha biss, din abdikat u d-delegat il-poter taghha b`tali mod li hatret sotto-kumitat kontra l-ligi u liema ma huwiex imwaqqaf b`ligi u dan bi ksur tad-dritt ghal smigh xieraq sancit fl-Art 39 tal-Kostituzzjoni u fl-Art 6 tal-Konvenzjoni.

Kuntrarjament ghal dak illi rrilevat il-Kummissjoni Elettorali, fil-fazi ta` investigazzjoni, il-garanziji tal-Art 6(1) tal-Konvenzjoni ghal smigh xieraq japplikaw.

Dan qed jinghad in linea ma` dak li pprovdiet din il-Qorti kif presjeduta fit-30 ta` Novembru 2017 fil-kaz ta` **L-On. Dr. Simon Busuttil kontra L-Avukat Generali.**

Inghad hekk :-

> *Fil-kaz tal-lum, il-Qorti tosserva li da parti tal-intimat qed jinghad illi l-Art 6 tal-Konvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fondamentali ("Il-Konvenzjoni") u l-Art 39 tal-Kostituzzjoni ta` Malta ("Il-Kostituzzjoni") ighoddu biss fil-kaz meta jkunu qed jigu determinati drittijiet jew obbligi civili jew meta wiehed qed ikun akkuzat b`reat kriminali.*
>
> *Fil-kors tat-trattazzjoni ta` din l-eccezzjoni, ir-rikorrent ghamel riferenza specifika ghas-sentenza li nghatat minn din il-Qorti diversament presjeduta fis-17 ta` Jannar 2002 fil-kawza :* ***Il-Kummissarju tal-Pulizija George Grech vs Id-Direttur Generali et.***
>
> *Dik is-sentenza kienet tirrigwarda eccezzjoni ta` l-Avukat Generali fis-sens li ma kienx hemm ksur ta` l-Art 39 tal-Kostituzzjoni u ta` l-Art 6 tal-Konvenzjoni ghaliex dawk id-disposizzjonijiet kienu*

japplikaw biss fil-kaz meta jkunu qed jigu determinati drittijiet jew obbligi civili jew meta wiehed qed ikun akkuzat b`reat kriminali.

Inghad hekk fis-sentenza citata mir-rikorrent :-

"Fuq rapport, denunzja jew kwerela, li fuqhom ghandhom isiru proceduri, maghmula lill-Pulizija Ezekuttiva jew lil Magistrat, ghandhom jibdew proceduri. Jistghu isiru accessi, jinstemghu xhieda, jigu elevati oggetti, nominati esperti biex jaghmlu ezamijiet tal-istess oggetti u jigu preparati rapporti. Il-Magistrat jista` jordna l-arrest ta` kull persuna li waqt l-access jikxef li hija hatja, jew li kontra taghha jkunu ngabru indizji bizzejjed. Jista` jordna l-qbid ta` oggetti u tfittxija f`postijiet – 554. Bazikament l-inkjesta tal-Magistrat hi intiza ghall-preservazzjoni tal-provi u hu b`mod eccezzjonali illi l-magistrat jezercita l-poter tieghu taht l-artikolu 554 (1) tal-Kodici u jordna 1-arrest. Suggett materjali tar-reat ghandu jigi deskritt bid-dettalji kollha wiehed wiehed u ghandu jigi msemmi l-istrument u l-mod li bih dan l-istrument seta` jgib l-effett.

Waqt l-access jistghu jittiehdu ritratti. Jistghu jinstemghu diversi xhieda u dawn ghandhom jigu mdahhla fil-process verbal. Izda inkjesta ssir fil-maghluq b`segretezza kbira, fejn sahansitra xhud ma jkunx jaf x`qed jghid xhud iehor dwaru, fejn la jidhlu avukati, fejn lanqas isir kontroll ta` xhieda jew kontro-ezami minn avukati u fejn kollox isir b`riserva u diskrezzjoni kbira. Meta inkjesta tkun ghadha miexja ebda persuna ma tkun ghadha giet akkuzata b`reat.

Infatti Magistrat huwa obbligat li jieqaf milli jkompli bl-investigazzjoni tieghu meta jigi nfurmat li persuna jew persuni gew imressqa jew sejrin jitressqu akkuzati bir-reat relattiv. L-inkjesta Magisterjali b`ebda mod ma tista` tkun kunsidrata bhala "a trial" izda kostatazzjoni ta` fatti, ghalkemm il-Magistrat spiss jesprimi opinjoni prima facie dwar jekk ghandhomx jittiehdu procedure fil-konfront ta` persuna jew persuni in konnessjoni ma` xi reat. L-artikolu 550 (5) jsemmi li l-process verbal ghandu jkun fih paragrafu finali

bil-konkluzzjonijiet tal-Magistrat Inkwirenti. Il-process verbal maghmul regolarment jista` jinghata bhala prova fis-smigh tal-kawza. L-atti ghandhom jintbaghtu mill-Magistrat lill-Avukat Generali li jiddecidi jekk hemmx ragunijiet sufficjenti biex jipprocedi. Jekk l-Avukat Generali jiddecidi li ma ghandux isir xejn aktar kollox jieqaf hemm indipendentement mill-opinjoni li jkun esprima il-Magistrat. Jistghu anke jittiehdu passi kontra persuna ohra minn dik indikata mill-Magistrat.

F`kaz ta` guri, jew kumpilazzjoni jinghad li bniedem ghadda guri, jew kumpilazzjoni. Izda f`kaz ta` inkjesta mhux legalment ezatt u korrett dak li jghid ir-rikorrent fl-ewwel paragrafu tar-rikors tieghu u cioe` illi hu `kien ghaddej inkjesta`; fil-verita` tkun qed issir inkjesta dwar allegazzjonijiet illi jinvolvu lir-rikorrent. Dak li qed jigi indagat u investigat fl-inkjesta hu l-veracita` ta` l-allegazzjonijiet li setghu saru fil-konfront tar-rikorrent u biex jigi determinat jekk hemmx tracci jew elementi ta` xi reat li ghalih xi persuna (jista` jkun kemm ir-rikorrent kif ukoll xi persuna ohra inkluz min ghamel l-allegazzjonijiet) tista` tkun mitluba tirrispondi ghalihom. Fl-inkjesta ma ssir qatt aggudikazzjoni dwar il-htija o meno ta` xi indagat. Dan kollu jwassal ghall-fatt li inkjesta jew investigazzjoni mhix ekwivalenti ghal akkuza jew process kriminali – ossija f`dak l-istadju ma jkunx hemm persuna akkuzata b`reat kriminali kif jitlob l-artikolu 39 tal-Kostituzzjoni jew l-artikolu 6 tal-Konvenzjoni."

Id-decizjoni kienet fis-sens illi :-

"Illi minn dak li intqal fuq jirrizulta li meta tkun qeghda ssir inkjesta dwar xi allegat reat, ma tkunx ghada harget akkuza kontra xi hadd. Infatt l-istess rikorrent ilmenta li lanqas biss kien notifikat li qeghda ssir inkjesta u sar jaf biss mill-media. Tant kemm l-inkjesta ma tikkomprendix att ta` akkuza li meta tohrog akkuza l-Magistrat ikollu jieqaf minn l-inkjesta. Ukoll meta tinghalaq inkjesta u tintbaghat lill-Avukat Generali mhix awtomatika li tohrog att ta` akkuza kontra l-persuna li l-Magistrat jidhirlu. LAvukat Generali ghandu l-obbilgu li jezamina l-Process Verbal u jara hu jekk

ghandux johrog xi att ta` akkuza fil-konfront tal-persuna imsemmija jew persuni ohra, jew jista` jhoss li ma hemmx provi sufficjenti li persuna tigi akkuzata b`reat. Jekk jasal ghall-konkluzzjon li ma ghandiex issir tali akkuza, dik il-persuna qatt ma tigi akkuzata. Tant kemm fil-kaz in ezami li ma kienx hemm akkuza fil-konfront tar-rikorrent li meta r-rikorrent deher quddiem il-Magistrat hass li ghandu jistaqsiha dwar x`inhu s-suggett tal-inkjesta [ghalkemm fir-rikors hu qal ta` xhiex qieghed jigi akkuzat].

Kieku kien hemm akkuza hu kien irid jigi notifikat bil-miktub blakkuza specifika u kien ikun jaf ta` xhiex hu akkuzat. Ukoll peress li ma kienet saret ebda akkuza, kif sostna l-istess rikorrent, hi wegbitu "sexual abuse" li certament ma tistax tammonta ghal akkuza ghax kif semma l-istess rikorrent dan mhux terminu legali fis-sistema lokali. Ghalhekk zgur li f`dan il-kaz ir-rikorrent ma giex notifikat bin-"nature and cause of accusation against him".

Ta` min isemmi li wiehed mill-iskopijiet ta` l-inkjesta hu propju dak li jigi determinat jekk verament giex kommess reat, u fil-kaz affermattiv minn min; u allura kif jista` jkun li tkun harget akkuza fil-konfront ta` xi hadd meta ghada ghaddejja inkjesta.

Ghalhekk ezami akkurat tal-kliem u l-ispirtu li hemm fl-Artikolu 39 tal-Kostituzzjoni kif ukoll fl-Antikolu 6 tal-Konvenzjoni juru bla ebda dubju li l-garanziji f`dawn l-artikoli japplikaw biss ghal persuna akkuzata. Jekk isir gbir hazin ta` provi matul inkjesta jaghtu dritt lill-persuna akkuzata jinvoka l-artikolu 39 u l-artikolu 6 fil-process fejn dawk il-provi jingiebu quddiem qorti fi process biex tigi determinata xi akkuza kriminali mahruga kontra tieghu.

*Li kieku harget akkuza kontra r-rikorrent dan kien ikun intitolat li jistitwixxi l-kawza odjerna ghax f`dak il-kaz f`dak il-mument kien jaqa` fit-termini tal-ligi, u f`dan is-sens izda mhux ghar-ragunijiet hemm imsemmija, il-Qorti setghet forsi tezamina d-dettalji fil-kaz ta` **Longinu Aquilina**.*

Illi ghalhekk b`dak li allegatament sar ma gewx miksura l-artikoli 39 tal-Kostituzzjoni u l-artikolu 6 tal-Konvenzjoni ghax dawn huma applikabbli ghal min ikun akkuzat b`reat kriminali, jew f`kaz ta` meta jkunu qeghdin jigu determinati drittijiet jew obbligi civili. Kif issemma fuq ir-rikorrent qatt ma gie akkuzat b`reat kriminali.

Huwa ovvju li hawn ma kienx kaz ta` drittijiet jew obbligi civili."

Dan premess,

Tqis li ghall-kaz tal-lum ghandha tapplika l-gurisprudenza l-aktar ricenti tal-Qorti Ewropea tad-Drittijiet tal-Bniedem ("ECHR") u tal-qrati taghna dwar l-Art 6 tal-Konvenzjoni.

Din il-Qorti qeghda tirreferi ghal fejn inghad illi kull persuna akkuzata b`reat kriminali hija ntitolata ghal smigh xieraq mhux biss fil-kors tal-proceduri kriminali izda wkoll waqt il-pre-trial stage.

*Huwa pacifiku fil-gurisprudenza tal-ECHR illi d-dritt ghal smigh xieraq japplika sa minn meta jkun hemm a criminal charge li skont l-interpretazzjoni ta` l-ECHR tissussisti sa minn meta l-persuna hija substantially affected b`investigazzjoni dwar reat kriminali fosthom "the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when preliminary investigations were opened" (ara : **Alexander Zaichenko vs Russia** : App. 39660/02 : 18 ta` Frar 2010).*

Fil-kaz ta` **Salduz vs Turkey** (App. 36391/02 : 27 ta` Novembru 2008), l-ECHR sostniet illi :-

"55 … the Court finds that in order for the right to a fair trail to remain sufficiently "practical and effective" (see paragraph 51 above), Article 6(1) requires that as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right."

Fil-kaz ta` **Karabil vs Turkey** (App Nru 5256/02) deciz fis-16 ta` Gunju 2009) ECHR sahqet li suspettat huwa intitolat ghall-protezzjoni skont l-Art 6 tal-Konvenzjoni anke waqt l-interrogatorju.

*L-istess inghad fis-sentenza tal-24 ta` Ottubru 2013 fil-kaz ta` **Navone and others vs Monaco** (App Nru 62880/11, 62892/11, 62899/11).*

Fid-decizjoni tal-Grand Chamber tal-ECHR tat-12 ta` Mejju 2017 fil-kawza **Simeonovi v. Bulgaria**, kien trattat l-Art 6 tal-Konvenzjoni fil-kuntest ta` procediment kriminali.

Fid-decizjoni nghad hekk :-

*"110. The protections afforded by Article 6 §§ 1 and 3 apply to a person subject to a "criminal charge", within the autonomous Convention meaning of that term. A "criminal charge" exists from the moment that an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him (see **Deweer v. Belgium**, 27 February 1980, §§ 42-46, Series A no. 35; **Eckle v. Germany**, 15 July 1982, § 73, Series A no. 51; **McFarlane v. Ireland** [GC], no. 31333/06, § 143, 10 September 2010; and, more recently, **Ibrahim and Others v. the United Kingdom** [GC], nos.50541/08 and 3 others, § 249, ECHR 2016).*

*111. Thus, for example, a person arrested on suspicion of having committed a criminal offence (see, among other authorities, **Heaney and McGuinness v. Ireland**, no. 34720/97, § 42, ECHR 2000-XII, and **Brusco v. France**, no. 1466/07, §§ 47-50, 14 October 2010), a suspect questioned about his involvement in acts constituting a criminal offence (see **Aleksandr Zaichenko v. Russia**, no. 39660/02, §§ 41-43, 18 February 2010; **Yankov and Others v. Bulgaria**, no. 4570/05, § 23, 23 September 2010; and **Ibrahim and Others**, cited above, § 296) and a person who has been formally charged, under a*

procedure set out in domestic law, with a criminal offence (see, among many other authorities, ***Pélissier and Sassi v. France*** *[GC], no. 25444/94, § 66, ECHR 1999-II, and* ***Pedersen and Baadsgaard v. Denmark*** *[GC], no. 49017/99, § 44, ECHR 2004-XI) can all be regarded as being "charged with a criminal offence" and claim the protection of Article 6 of the Convention. It is the actual occurrence of the first of the aforementioned events, regardless of their chronological order, which triggers the application of Article 6 in its criminal aspect." (enfazi mizjud)*

L-ECHR kienet cara fis-sens illi d-dritt ghal smigh xieraq ighodd fil-pretrial stage.

Din il-linja ta` hsieb kienet applikata fid-decizjoni illi tat din il-Qorti kif presjeduta fis-27 ta` Gunju 2017 (Ref. Kost. Nru. 104/16 JZM) : ***Il-Pulizija (Spettur Malcolm Bondin) v. Aldo Pistella*** *: fil-kuntest tad-dritt ghal assistenza minn avukat anke waqt interrogazzjoni.*

Fid-decizjoni ta` din il-qorti, diversi kienu r-referenzi ghal gurisprudenza ohra tal-ECHR fejn inghad kjarament li l-Art 6 tal-Konvenzjoni kien japplika ghall-pre-trial stage.

Rilevanti ghall-fattispeci tal-kaz tal-lum kienet is-sentenza li tat din il-Qorti diversament presjeduta fid-19 ta` April 2012 fil-kawza : ***Alfred Degiorgio et vs Avukat Generali et.***

F`dak il-kaz l-intimati sahqu li la l-Art 6 tal-Konvenzjoni u lanqas l-Art 39 tal-Kostituzzjoni ma huma applikabbli fil-kaz ta` inkjesta, peress li sa l-istadju ta` inkjesta, hadd ma jkun akkuzat b`reat kriminali.

Kien ukoll sar l-argument illi d-drittijiet kollha protetti bl-Art 39 tal-Kostituzzjoni fil-kamp kriminali jimxu ghall-fini ta` applikazzjoni fuq il-premessa illi l-persuna koncernata trid tkun akkuzata b`reat kriminali.

Hemm kienet citata mill-intimati d-decizjoni ta` din il-Qorti diversament presjeduta tas-17 ta` Jannar

2002 fil-kawza ***Karl Heinrich Muscat vs Avukat Generali*** *fejn kien rilevat illi inkjesta ma tiddeterminax akkuza kriminali.*

Fis-sentenza nghad hekk :-

"Stranament l-intimati jissottomettu li l-artikolu 39 tal-Kostituzzjoni u l-artikolu 6 tal-Konvenzjoni mhux applikabbli ghall-procedura ta` inkjesta, stante li fl-inkjesta m`hemmx min ikun akkuzat b`reat kriminali u inoltre d-drittijiet protetti bl-artiklu 39 tal-Kostituzzjoni japplikaw ghall-persuna li tkun akkuzata b`reat kriminali. L-intimati donnhom li jinsew li gie diversi drabi deciz li d-drittijiet li huma applikabbli ghal min hu akkuzat b`reat huma applikabbli ukoll ghall-proceduri li jwasslu ghal meta xi hadd eventwlment jigi arrestat u akkuzat formalment b`reat. Inoltre jista jkun li l-ligi tisssanzjona li l-Pulizija jista juzaw dik il-forza minima sabiex jitwettqu l-ordnijiet tal-istess Magistrat. Meta tinghata ordni bhal din minn Magistrat Inkwewerenti tali ordni trid tinghata bl-ikbar kawtela b`mod partikolari preress l-inkjesta Magisterjali tkun qed titmexxa in parallel mal-investigazzjonijiet u jista jkun hemm is-suspett, kif fil-fatt hemm f`dawn il-proceduri, li tali ordni tkun qed tinghata in vista biss tal-investigazzjoni tal-pulizija ..." (enfazi mizjud)

Din is-sentenza kienet appellata.

Fil-5 ta` April 2013 kien hemm decizjoni mill-Qorti Kostituzzjonali fejn ghalkemm kien hemm riforma tas-sentenza, il-principji tad-dritt kienu kkonfermati kollha.

Fil-fehma ta` din il-Qorti, ir-referenza li ghamel l-intimat ghad-decizjoni ta` ***Il-Kummissarju tal-Pulizija George Grech vs Id-Direttur Generali u Registratur tal-Qrati et*** *llum ma taghtix sostenn lir-rikorrent ghall-oggezzjoni tieghu.*

Il-Qorti tirrimarka li inkjesta magisterjali hija ntiza biex tikkonserva l-in genere u ma twassal qatt ghal gudizzju finali, u kwalunkwe konkluzjoni hemm milhuqa hija dejjem a bazi ta` prima facie.

Fis-sostanza, inkjesta magisterjali issir sabiex ikunu ppreservati l-provi.

Jekk mill-provi, hekk ippreservati, jirrizulta li jkun sar reat, u li jista` jkun hemm persuna jew aktar li tkun jew li jkunu ndizzjati fit-twettieq ta` reat, allura l-Magistrat Inkwerenti ghandu jindika li sar reat, u ghandu jordna li jibdew procedura kriminali kontra l-indizzjat jew indizzjati.

Ghalkemm huwa minnu li wiehed mill-ghanijiet ta` inkjesta magisterjali hu proprju dak li jigi determinat jekk tabilhaqq kienx kommess reat, il-garanziji li jahsbu ghalihom l-Art 39 tal-Kostituzzjoni u l-Art 6 tal-Konvenzjoni jghoddu anke f`dak l-istadju."

Stabbilit dan kollu, din il-Qorti tqis li abbazi tal-provi akkwiziti, jirrizulta li l-rwol ta` s-sotto kumitat mahtur mill-Kummissjoni Elettorali kien ristrett esklussivament ghall-gbir ta` informazzjoni biss.

L-informazzjoni rakkolta kellha tghaddi ghand il-Kummissjoni Elettorali sabiex din taghmel l-evalwazzjonijiet taghha.

Din il-Qorti ma tarax li bil-hatra ta` sotto-kumitat ghall-iskop premess, il-Kummissjoni Elettorali tat xi delega ta` funzjonijiet jew setghat li jispettaw lilha jew agixxiet bi ksur tal-Art 39 tal-Kostituzzjoni u tal-Art 6 tal-Konvenzjoni.

L-Art 37(4) tal-Kap 544 jispjega l-obbligu li ghandha l-Kummissjoni Elettorali sabiex tinvestiga l-finanzjament tal-partiti politici :

Il-Kummissjoni ghandha, fejn jidhrilha li hu mehtieg ghall-infurzar xieraq tad-dispozizzjonijiet ta` dan l-Att u bla hsara ghall-obbligu taghha li tagixxi b`mod proporzjonat, is-setgha li tinvestigau titlob sabiex tigi provduta bl-informazzjoni kollha li tista` tehtiegminn xi partit politiku, individwu, persuna guridika, korp, inkluz xiistituzzjoni finanzjarja u, jew xi fornitur ta` servizz tat-telekomunikazzjoni, li jistghu jkunu fil-pussess ta`

informazzjoni bhal din sabiex jigi stabbilit is-sors ta` kull donazzjoni ricevutamill-partit politiku:

Izda l-partiti politici ma ghandhomx ikunu obbligati li jizvelaw lill-Kummissjoni s-sors ta` kull donazzjoni ta` mhux aktarminn hames mitt euro (€500) moghtija lilhom b`mod kunfidenzjalisakemm il-Kummissjoni ma tipprovdix prova li hemm baziragonevoli biex wiehed jemmen li l-ammont attwalment moghti b`mod kunfidenzjali fil-perjodu ta` sena mill-istess sors jaqbez is-somma ta` hames mitt euro (€500).

Huwa minnu li l-ligi ma tispjegax il-modalita` li biha ghandha issir l-investigazzjoni.

Tali investigazzjoni ghandha tigi kkunsidrata fis-sens ordinarju tal-kelma, ossija gbir ta` informazzjoni dwar il-fatt jew l-ilment li jkun qieghed jigi investigat.

Fil-fehma tal-Qorti, dan jista` jsir billi jitqabbdu terzi biex jigbru l-informazzjoni biss waqt li l-Kummissjoni Elettorali tkun hi li tiddeciedi.

Il-Qorti tqis illi s-sotto kumitat qieghed jigbor biss informazzjoni sabiex imbaghad il-Kummissjoni Elettorali tiddeciedi jekk hemmx ilment fondat li per konsegwenza jinhtieg li jitkompla l-process.

F`tali kaz, imbaghad il-Kummissjoni Elettorali taghti l-opportunita` lill-partijiet biex igib `l quddiem il-verzjoni taghhom u jressqu l-provi quddiemha.

Ghalhekk kollox jerga` jinstema` imbaghad mill-Kummissjoni Elettorali.

It--*terms of reference* jirrizutaw a fol 50 sa 51 u cioe` :

(i) jigbor it-taghrif u provi kollha possibbli dwar l-allegazzjonijiet fl-ittri msemmija u

(ii) billi jifli tali provi u jirredigi rapport dwar is-sejbiet tieghu kemm ta` ligi kif ukoll ta` fatt, liema rapport ghandu jinghata biss lill-Kummissjoni Elettorali. Ir-rapport ghandu jindika jekk u kif is-sejbiet maghmula mill-Bord jindikawx li kien hemm xi ksur tal-Ligi dwar il-Finanzjament tal-Partiti Politici. Dan ghandu jsir sabiex il-Kummissjoni Elettorali tkun f`qaghda li tiehu d-decizjoni ahharija. Il-Kummissjoni jkollha d-dritt li taddotta jew taddotta parzjalment jew tiskarta s-sejbiet tal-Bord peress li hi l-Kummissjoni li skont il-ligi ghandha l-funzjoni li tiddeciedi.

Kif ukoll li :

Il-Bord ghandu jigbor kull taghrif, dikjarazzjonijiet, affidavits, provi, u dokumenti ohra li jistghu jkunu rilevanti jew mehtiega sabiex jitfghu dawl u jghinu lill-Kummissjoni tasal ghad-decizjoni dwar jekk hemmx xi ksur tal-Ligi dwar il-Finanzjament tal-Partiti u tiehu dawk il-passi doveruzi skont l-istess Att.

IX. <u>Is-seba` (7) talba</u>

Ir-rikorrenti talbet ukoll lill-Qorti sabiex tiddikjara li in kwantu l-process quddiem is-sotto kumitat mahtur kontra l-ligi mill-Kummissjoni Elettorali, dan is-sotto kumitat u l-membri mahtura fih ma jgawdix dawk il-garanziji mehtiega biex jassiguraw il-garanziji ta` qorti jew tribunal kif jitlob id-dritt ghal smigh xieraq ; ghalhekk tiddikjara li kien hemm ksur tal-Art 39 tal-Kostituzzjoni u tal-Art 6 tal-Konvenzjoni.

Is-sotto-kumitat mhuwiex l-organu li ser jiehu d-decizjoni. Il-kompitu tieghu huwa dak deskritt bhala ta` *fact finding*.

Id-decizjoni tispetta lill-Kummissjoni Elettorali.

Ghalhekk is-sotto-kumitat ma kienx mehtieg li jissodisfa l-garanziji mehtiega ta` imparzjalita` u indipendenza.

Din il-Qorti hadet konjizzjoni tal-gurisprudenza tal-ECHR li rrefew ghaliha r-rikorrenti : fosthom **I.J.L. and others vs The United Kingdom** (19 ta` Dicembru 2000) ; **Saunders vs the United Kingdom** (17 ta` Dicembru 1996) ; **J.B. vs Switzerland** (3 ta` Awissu 2001) ; **Kansal vs The United Kingdom** (10 ta` Novembru 2004).

Madanakollu, dawn il-kazi kienu jitrattaw kwistjonijiet fejn intuzat xhieda li l-applikanti gew kostretti jaghtu lil ufficjali waqt is-smigh tal-kaz imressaq kontra l-istess applikanti.

Fil-kaz odjern, din il-Qorti tqis li l-Kummissjoni Elettorali ghandha l-jedd li titlob lill-partiti politici sabiex jaghtu informazzjoni izda ma tistax tikkonstringihom sabiex jaghtu dik l-informazzjoni.

In aggunta, jinghad ukoll li kwalunkwe decizjoni li tiehu l-Kummissjoni Elettorali tista` tigi kkontestata quddiem il-Prim` Awla tal-Qorti Civili u sussegwentement quddiem il-Qorti ta` l-Appell.

Il-qrati ordinarji ghandhom gurisdizzjoni shiha li jevalwaw u jippronunzjaw ruhhom dwar id-decizjoni li tiehu l-Kummissjoni Elettorali.

Ghalhekk anke din it-talba qeghda tkun respinta.

X. It-tmien (8) u d-disa` (9) talbiet

Billi dawn it-talbiet huma konsegwenzjali ghal dawk precedenti, u billi dawk precedenti kienu michuda, din il-Qorti l-istess qed taghmel fir-rigward ta` dawn.

Decide

Ghar-ragunijiet kollha premessi, il-Qorti qeghda taqta` u tiddeciedi dwar it-talbiet tar-rikorrenti u dwar l-eccezzjonijiet tal-intimati billi qeghda :-

Tichad l-ewwel (1) u t-tieni (2) eccezzjonijiet preliminari tal-intimat Avukat Generali.

Tilqa` l-eccezzjoni fil-mertu tal-intimat Avukat Generali.

Tilqa` l-eccezzjonijiet tal-intimata Kummissjoni Elettorali.

Tichad it-talbiet kollha tar-rikorrenti.

Bl-applikazzjoni tal-Art 223(3) tal-Kap 12 tal-Ligijiet ta` Malta, tordna li kull parti tbati l-ispejjez taghha.

Onor. Joseph Zammit McKeon
Imhallef

Amanda Cassar
Deputat Registratur